Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT J. MURPHY,

Petitioner,

v.

FEDERAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where petitioner/insured complied with all policy conditions demanded by insurer concerning physical losses to his premises admittedly due to hurricane and commenced state court action against insurer based on insurer's material breach of contract and bad faith removed to federal court under diversity jurisdiction, whether court erred in affirming summary judgment against insured involving disputed material issues of fact and law because of non-party family members personally refused to voluntary appear for their scheduled videotape pretrial depositions in exercise of their fundamental Constitutional individual liberty, privileges and immunity over whom petitioner has no obligation, power, authority, control or ability to compel his wife and emancipated sons who have separate legal identity to appear for videotape pretrial discovery depositions, where insurer never complied with Federal Rules of Civil Procedure and Evidence including issuance and personal service of judicial subpoena together with simultaneous tender of witness fee and mileage on non-party family members necessary to compel their appearance at videotape pretrial discovery depositions and invest District Court with personal jurisdiction over these non-parties depriving petitioner of his Constitutional rights to due process of law and a jury trial contrary to fundamental constitutional, legal and rule limits concerning District Court's judicial subpoena power including to sanction a party without his willfulness, bad faith, fault collusion or control concerning non-parties who personally refuse to appear for pretrial discovery depositions pursuant to their

federal and state individual, Constitutional and legal liberty, privacy, privileges and immunity.

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Petitioner, Robert J. Murphy, respectfully petitions for a writ of certiorari to review judgment of United States Court of Appeals for Third Circuit.

OPINIONS BELOW

The opinion of Court of Appeals affirming orders of February 25, 2005, Jan. 18, 2006, and Jan. 24, 2006; dismissing appeal at No. 05-1814 reported at 2006 U.S. App. LEXIS 28694 and reproduced in App.B,6a. The opinion of District Court granting Federal summary judgment reported at 2006 U.S.Dist. LEXIS 1694 and reproduced in App.D,22a.

JURISDICTION

The Court of Appeals entered judgment on Nov. 20, 2006. A timely petition for rehearing was denied on Jan. 3, 2007 and reproduced at App.A. Jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and court's Rule 13.3.

CONSTITUTIONAL, STATUTORY AND FEDERAL EVIDENTIARY CIVIL PROCEDURAL RULES INVOLVED

1. The petitioner provides following constitutional, statutory and federal evidentiary, and civil procedural rule citations and their pertinent text is set forth at App.G-R; Art. III, Fifth and Seventh Amendments to U.S. Constitution; 28 U.S.C. 1821; FRCP 26, 30, 37, 45; F.R.E. 501; Pa.Const.Art. 1, Sec. 1, Sec. 11; 42 Pa.C.S.A., 5923, 5924.

STATEMENT

The basis for Federal jurisdiction in District Court is removal under 28 U.S.C. 1441.

The undisputed evidence and all reasonable inferences viewed favorably to petitioner demonstrates following facts upon which petitioner seeks review from Third Circuit's decision in conflict with decisions from other United States Court of Appeals on same important matter; the court has decided an important question of federal law that has not been, but should be, settled by this Court or has decided important federal question conflicting with relevant decisions in this Court; and court's decision has so far departed from accepted and usual course of judicial proceeding or sanctioned such a departure by the district court as to call for an exercise of this Court's supervisory power.

On Sept. 17, 1999 petitioner admittedly sustained covered losses to his real property at 7 Cooperstown Road, Haverford, Pa. due to hurricane, "Floyd"; Federal Ins. (Federal) has never denied or excluded coverage for these losses and has no reason to! App.T,91a. Petitioner's wife and sons have no interest whatsoever, legal or equitable, in any real estate owned by petitioner including damaged premises. Petitioner purchased so-called "Masterpiece Homeowners All Risk Insurance Policy" indemnifying him for all physical losses sustained to his damaged property during policy period and alone paid all premiums and accepted policy. Petitioner did not request Federal to name any other person including his wife as named insured under this policy required under

40 P.S. Sec. 752(a)(3). The policy expressly excludes any coverage to anyone who lacks an "insurable interest" in damaged property under state law. Policy expressly provides: "...coverage applies separately to each covered person."; and policy shall conform to state law; if any policy provision conflicts with laws of state in which petitioner lives, policy amended to conform to those laws. In address form regarding name and address of insured ostensibly identified Robert and Kathleen Murphy, although petitioner had never requested or identified his wife be included as named insured on this policy and she is prohibited under state law from being an insured! Petitioner and his family were not present and did not witness losses at his premises on Sept. 17, 1999; he immediately notified Federal via telephone and in writing receipt of which Federal expressly acknowledged from Chicago during week of Sept. 17, 1999. At all times petitioner voluntarily complied with all demanded policy conditions including repeatedly providing all available oral and written information, estimates and repeatedly displayed all undisputed physical losses due to hurricane. Federal refused to investigate including inspecting losses until first examined losses on September 17, 2000 approximately one year after receipt of notices! Federal conducted 8 separate unrestricted inspections confirming petitioner sustained all his physical losses due to hurricane Floyd. App.X,99a. Federal also contacted Mingioni Construction, Inc. who provided repair estimates for losses confirming all losses resulted from hurricane App.AA. Federal's records and testimony from its only designated witness confirm all petitioner's losses to his premises caused by hurricane and covered and therefore no subrogation available: "...sub

rogation: no subro available as loss caused by hurricane...coverage confirmed: yes." Id. App.U,92a.

Defendant never sought, demanded or requested petitioner or any member of his family including his wife and sons provide any disputed so called "examination under oath" at any time including prior to or after suit; at no time did Federal ever advise petitioner failed to fully comply with all terms and conditions of policy including alleged but disputed "examination under oath" provision which was not included in policy delivered to petitioner by agent; Federal paid petitioner $3,500.00 less deductible without limitation confirming coverage for his losses. As a result of Federal's unreasonable delay petitioner pursued his state court claim on basis Federal materially breached insuring agreement discharging petitioner from any alleged policy conditions pursuant to this adversarial proceeding on Sept. 7, 2001!. Throughout entire protracted proceedings Federal only belatedly sought pretrial discovery under federal law purporting to first schedule petitioner's wife's pretrial videotape deposition on May 13, 2004 without issuing and personally serving petitioner's wife with a subpoena together with simultaneous tender of $40.00 witness fee and mileage necessary to compel her attendance and therefore Federal cancelled this deposition on Nov. 4, 2004. Federal purported to file Rule 37 motion to compel pretrial discovery deposition from petitioner's wife to which petitioner objected because Federal never issued or personally served petitioner's wife with subpoena together with simultaneous $40.00 witness fee and mileage and wife is deemed incompetent, immune and absolutely prohibited from being a witness during coverture pur-

suant to non-waivable constitutional and legal right under Pennsylvania law absent statutory exceptions admittedly not applicable in this case and petitioner's wife personally refused to voluntarily appear having no interest including insurable interest in the policy or proceeds and not a witness or party to proceedings or policy and court lacked personal jurisdiction over her and petitioner has absolutely no control over her. On Dec. 20, 2004 Federal purported to file a motion for sanction under F.R.C.P. 37 to compel pretrial discovery depositions from petitioner's emancipated sons although Federal had never noticed their deposition or issued or personally served petitioner's sons with a valid subpoena including simultaneous tender of $40.00 witness fee and mileage to which petitioner filed the foregoing objections as well including court lacked personal jurisdiction over them and his sons personally refused to voluntarily appear for pretrial deposition over whom petitioner has no control! Trial court purportedly granted Federal's motion to compel wife's pretrial discovery deposition and pretrial discovery deposition from petitioner's sons on Feb. 25, 2005 and directed petitioner "arrange" for his sons to appear for pretrial depositions at defense counsel's law office within 15 days at a convenient time to petitioner and defense counsel! Petitioner appealed from court's foregoing orders and filed emergency petition for supersedeas and reconsideration with trial court and appellate court; on June 7, 2005 trial court denied foregoing motions and appellate court ultimately dismissed petitioner's pending emergency supersedeas petition as moot when trial court entered summary judgment on Jan. 24, 2006. Federal noticed videotape pretrial deposition for petitioner's son's on March 11, 2005 and petitioner's wife

for March 18, 2005 pursuant to federal rules of civil procedure. Petitioner appeared at March 11, 2005 pretrial deposition scheduled for sons and advised sons rejected petitioner's request to voluntarily appear and sons personally refused to voluntarily appear for any videotape pretrial deposition or submit to court's jurisdiction without valid personal service of judicial subpoena, witness fee and mileage and were beyond territorial limits of court's jurisdiction; petitioner appeared via telephone conference at wife's videotape pretrial deposition on March 18, 2005 and advised wife also personally refuse to voluntarily appear or submit to court's jurisdiction in exercise of her fundamental constitutional and legal rights to privacy and immunity and Federal's failure to issue or personally serve her with a subpoena, witness fee and mileage necessary to compel her appearance. While specifically recognizing virtually all material facts and legal issues were disputed, the appellate court affirmed summary judgment in favor of Federal based on conclusary rationale petitioner had obstructed the deposition process by not complying with discovery orders and insurance policy which prejudiced Federal. App.B,18a,E,F,V,Y,Z.

REASONS FOR GRANTING THE PETITION

The United States Court Of Appeals Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court, Or Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court And United

States Constitution And Federal Civil Procedure And Evidentiary Rules

In *Cohens v. Virginia,* 19 U.S. 264 emphasized fundamental limits imposed under United States Constitution regarding exercise of Federal jurisdiction declaring Court has, "no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution." *United States v. Morton Salt Company,* 338 U.S. 632 decided judicial subpoena power not only is subject to specific constitutional limitations such as against self-incrimination, unreasonable search and seizure, due process of law but is subject to those limitations inherent in the body that issues them under Judiciary Article and reversed court's decision dismissing F.T.C.'s suits seeking to compel respondents comply with its order to file special reports and recover penalties for non-compliance recognizing fundamental Constitutional right to be left alone characterizes the most comprehensive of rights and right most valued by civilized men guaranteed under Federal Constitution which extends to compulsory process involving individuals which would not be available to incorporated or unincorporated associations and a judicial tribunal does not function as freestanding investigative body. *United States Catholic Conference et al. v. Abortion Rights Mobilization,* 487 U.S. 72 reiterated limits on judicial subpoena power announced in *Morton Salt* noting Court's Rule 45 grants court power to issue subpoenas as to witnesses and documents but subpoena power cannot be more extensive then jurisdiction and concluded where non-party church conferences which had been dropped as defendants could chal-

lenge civil contempt orders and fines resulting from their refusal to comply with subpoenas served on church conferences based on defense of lack of subject matter jurisdiction resting decision on central principal of free society that courts have finite bounds of authority, some of Constitutional origin which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power, and courts no less than political branches of government must respect limits of their authority. In *Ruhrgas Ag. v. Marathon Oil Company, et al,* 526 U.S. 574. Court reversed Fifth Circuit's decision vacating panel's decision deciding subject matter jurisdiction must be decided before personal jurisdictional issues reiterating although character of two jurisdictional bedrocks unquestionably differ, the distinctions do not mean subject matter jurisdiction is ever and always the more "fundamental" than personal jurisdiction and declared personal jurisdiction, too, is an essential element of district court jurisdiction, without which court is powerless to proceed to adjudication relying on *Employers Reinsurance Corporation v. Bryant,* 299 U.S. 374. *Insurance Corp. of Ireland, Ltd., et al v. Compagnie Des Bauxites De Guinee,* 456 U.S. 694 concluded in context of personal jurisdiction involving a party, requirement court have personal jurisdiction flows not from Judiciary Article III but from due process clause because this requirement recognizes an individual liberty interest and represents a restriction on judicial power as a matter of individual liberty not as a matter of sovereignty. Court reiterated validity of any order of federal court depends upon court's exercising both subject matter and personal jurisdiction in the context of Court's power to issue orders directed to a party under F.R.C.P. 37(b)(2)

which rule contains two standards, one general and one specific limiting court's discretion. First, any sanction must be "just"; second, sanction must be specifically related to particular "claim" at issue in order to provide discovery. This Court emphasized distinction between subject matter and personal jurisdiction noting latter may be waived or lost.

Party seeking pretrial discovery from non-party must issue deposition notice and issue subpoena within court's territorial jurisdictional limits and personally serve non-party individual with validly issued subpoena together with simultaneous $40.00 witness fee and mileage otherwise court clearly lacks personal jurisdiction over non-party necessary to enforce subpoena or contempt motion. F.R.C.P. 26(b)(1)(c);30(a)(1)(b)(1)(3);(g)(2);37(a)(1)(2),(b)(1);45(a)(1)(A-D),(b)(1),(2),(3),(e). *Maness v. Meyers,* 41U.S. 449, 467-468; *U.S. v. Bryan,* 339 U.S. 323, 331; *U.S. v. Regan, 340 U.S. 462, 464 n3; In re: Dennis,* 330 F.3d 696, 704 (C.A. 5, 2003); *Tedder v. Odel,* 890 F.2d 210 (C.A. 9, 1989); *FTC v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (U.S. App. D.C. 1980); *Firefighters' Inst. For Racial Equality v. City of St. Louis*, 220 F.3d 898 Cert. Den. 523 U.S. 921; *C.F.&I Steel Corp. v. Mitsui and Co., (U.S.A.)* 713 F.2d 494, 496 (9th Cir. 1983); *Houston Business Journal, Inc., et al v. Office of Comptroller of Currency,* 86 F.3d 1208 (U.S.C.A.D.C. 1996); *Waste Conversion Inc. v. Rollins Environmental Services,* 893 F2d 605 (3rd Cir. 1990); *Klockner Namisco Holdings Corp. v. Daily Access.Com, Inc.,* 211 F.R.D. 685 (U.S.D.C.N.D. of GA.2002) quashing subpoena served on witnesses' wife at residence without simultaneous tender of $40.00 witness fee and mileage collecting cases

and treatises mandating personal service of validly issued subpoena together with simultaneous tender of witness fee and costs necessary to enforce subpoena on non-party.

In *Societe Internationale Pour Participants Industrielless et Commerciales, S.A. v. Rogers, Attorney General,* 357 U.S. 197 decided Rule 37 should not be construed to authorize dismissal of complaint because of party's non-compliance with pretrial discovery order when it has been established failure to comply has been due to inability and not to willfulness, bad faith, or any fault of petitioner relying on *Hovey v. Elliot,* 167 U.S. 409 and *Hammond Packing Company v. State of Arkansas,* 212 U.S. 322; court's power to dismiss an action under rule 37 must be read in light of provisions of Fifth Amendment that no person shall be deprived of property without due process of law and any reasonable showing of inability to comply satisfies requirements of a purportedly violated order! Although Court accepted district court's finding supported by evidence party was in control of relevant documents which it refused to produce on grounds their production would violate Swiss penal laws which was not considered an adequate excuse, Court reversed dismissal of party's action to recover assets seized by government under Trading With The Enemy Act as contrary to due process limitations imposed upon power of court even in aide of its own valid process to dismiss action without affording party opportunity for a hearing on the merits of his claims. In *National Hockey League, et al v. Metropolitan Hockey Club Inc., et al.,* U.S. 427 U.S. 639. applied *Societe* decision reversing order dismissing anti-trust action due to plaintiff's clearly demonstrated willful and bad faith refusal to timely

answer written interrogatories without adequate excuse pursuant to explicit findings by court supported by substantial evidence satisfying due process limits on court's power to dismiss action based on party's willful, bad faith fault in refusing to comply with court's valid discovery order directed to party. *Degen v. United States,* 517 U.S. 820 reversed judgment striking filings of petitioner in forfeiture suit granting summary judgment for failure to appeal related criminal proceeding under "Doctrine of Disentitlement" as contrary to his rights secured by due process clause and an unjustified exercise of court's judicial power collectin[illegible] relying on cases including *National Hockey League, and Societe Internationale*, and recognized judicial power to sanction party is limited by due process clause which requires bad faith, willful refusal to comply with legitimate order of court including discovery orders. In *Naviant Marketing Solutions, Inc. v. Larry Tucker, Inc.,* 339 F.3d 180, 185 (C.A. 3 2003) court reversed decision imposing Rule 37 sanctions resulting from court's failure to make explicit findings necessary to sustain sanctions citing *Ripley v. United States,* 220 U.S. 491, 496 involving "bad faith" which cannot be implied! In *Patton v. Aerojet Ordnance Company,* 765 F.2d 604 (6th Cir. 1985) one party to litigation could not be subjected to sanctions for failure to cooperate because of failure of another party to comply with discovery absent showing other party controls non-complying party. To same effect, see *Quality Prefabrication, Inc. v. Keating, et al.* 675 F.2d 77 (3d 1982). In *General Insurance Company v. Eastern Consolidated Utilities, Inc.*, 126 F.3d 215 (3d CA 1997) Rule 37(b)(2) applies on its face only to sanctions against parties while Rule 37(b)(1) and 45(e) provide exclusive power to treat failure of non-party

validly served with subpoena as contempt and do not provide for sanctions comparable to those authorized by Rule 37(b)(2) citing *Hammond Packing*.

Under Pennsylvania law, whenever insured sustains fortuitous physical loss under all risk policy to his property during policy period, coverage is triggered. *Miller v. Boston INS* 218 A.2d 275, 278: *Peco v. Boden*, 64 F3d 852 at 857 (C.A.3 1985); all conditions pertaining to insured after loss are not considered condition precedents under a strict contractual approach which is inappropriate regardless of policy's characterization of condition as "condition precedent"! All such conditions involve only forfeitures whereby carrier seeks to deny insured the very thing paid for. Where insurer defends on basis insured has forfeited coverage for failure to comply with any condition after payment of premiums and loss occurs court must balance equities in case to determine whether insured has failed to comply with condition actually causing prejudice to insurer which must be determined from facts and circumstances of each case and presents a jury question. *Brakeman v. Potomac, Ins.*, 371 A.2d 193, 196-199 (Pa. 1997). Court specifically decided:

> "Although the policy may speak of the notice provision in the terms of 'condition precedent," . . . nonetheless what is involved is a forfeiture, for the carrier seeks, on account of a breach of that provision, to deny the insured the very thing paid for. This is not to belittle the need for notice of an accident, but rather to put the subject in perspective. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier

> may forfeit the coverage, even though there is no likelihood that it was prejudiced by the breach. To do so would be unfair to insureds."

In *Rohm and Haas Co. v. Continental Cas. Co.*, 781 A.2d 1172, 1180-1181 (Pa.2001) (whether insured complied with condition precedent providing notice 24 years after insured knew of catastrophic environmental loss involved jury question which must be determined on facts of each case! Pennsylvania law demands insurer has "good faith" duty to promptly and reasonably initiate and request insured to perform conditions after a loss; thus insurer will not be permitted to take advantage of alleged failure of insured to perform any conditions after loss including conditions characterized as conditions precedent where insurer fails to make any prompt and reasonable request to insured to perform the condition and reasonably notify insured of alleged failure to perform condition; burden is imposed on insurer to establish a "good faith" prompt and reasonable demand and notification to insured to comply with condition and existence and failure to perform demanded condition and resulting prejudice therefrom involve jury questions depended on facts and circumstances in each case. *Rohm 1180-1181; Brakeman* 196-199; *Fedas v. Ins. Co. of the State of Pa.*, 151 A. 285 (Pa. 1930); *Pittsburgh v. Firemen's Ins. Co.*, 76 A.2d 368 (Pa. 1950); *Bush v. Hartford*, 71 A.916 (Pa. 1909); *Isaac v. Donegal*, 162 A 300, 301 (Pa. 1932); *Butler Candy v. Springfield Fire and Marine Insurance Co.*, 146 A. 135 (Pa. 1929); *Seibel v. Firemen's Insurance*, 62 A. 101 (Pa. 1905) Whether there has been a material breach or substantial "good faith" compliance by insurer or insured presents jury

question and material contract breach discharges the non-breaching party from performance or compliance with any conditions involving jury questions. *Berkowitz v. Mayflower Security Inc.*, 317 A.2d 584, 586 (Pa. 1974); *Widmer Engineering Inc. v. Dufalla,* 837 A.2d 459, 467-469 (Pa. 2003); App.Den. 2004 Pa. LEXIS 1039 (Pa.2004); *Cimina v. Bronich,* 537 A.2d 1355, 1358 (Pa.1988); *Murate Onal v. BP Amoco,* 134 Fed.Appx. 515, 517-518 (C.A.3 2005). Where policy expressly provides insured separate coverage breach by co-insured to comply with conditions shall not forfeit separate coverage owed to innocent insured and whether an individual has insurable interest involve jury issues. *Giacobetti v. Ins. Placement Facility of Pa.,* 457 A.2d 853, 856-857 (Pa. 1983) (criminal misconduct by insured causing fire loss could not be imputed to other co-trustee-insured forfeiting his policy proceeds; *VanCure v. Hartford Fire Insurance Co.;* 253 A.2d 663, 664 (Pa. 1969) appellant condemnee not an insured because she lacks insurable interest after title had passed. Where policy language is clear and unambiguous court applies language; when policy is ambiguous policy to be construed in favor of insured to further contract's prime purpose of indemnification as insurer drafts policy and controls choice of language which language will not assumed to be carelessly chosen. Insurance contract terms are not analyzed in isolation but rather court must take into account the entire contractual provisions to ascertain parties' intent. . *401 Fourth Street Inc. v. Investors. Insurance Group,* 879 A.2d 166 (Pa. 2005).

Under codified Pennsylvania common law, during coverture spouses are absolutely incompetent as witnesses in all civil matters which is non-waivable by parties or court and must be strictly enforced absent specific statutory exceptions admittedly not involved limited to (1) divorce; (2) support or relating to protection or recovery of marital or separate property; (3) custody or care of children; (4) protection from abuse; (5) prior or subsequent statutory exceptions which Court acknowledged in *Trammel v. United States,* 445 U.S. 40, 48-40, n.9. *Trammel* recognized ancient roots underlying this disqualification as a witness in accordance with common law absolutely prohibiting spouses from becoming witness either for or against each other under Pennsylvania law. 42 Pa.C.S.A. 5924(a)(b); F.R.E. 501; *Hinter's Appeal,* 54 PA. 110, 116-117 (1967); *Canole v. Allen,* 78 A1053 (Pa., 1908); *Novic et al v. Fenic et al,* 11A.2d 871, 874 (Pa. 1940); *Com v. Hancharik,* 633 A.2d 1074 (Pa.1993); *Com. v. Scott,* 532 A.2d 426, 429 (Pa. 1987); *Com v. Kirkner,* 805 A.2d 514 (Pa. 2002); *Kurland v. Stolker,* 533 A.2d 1370, 1374 (Pa. 1987); *Com v. Chiappini,* 782 A.2d 490 (Pa. 2001) declaring similar but different currently codified prohibition expressed in terms only of "privilege" pursuant to 42 PA.C.S.A. sec 5914 regarding prohibition concerning confidential communication between spouses in criminal proceedings was not specifically abrogated by current statutory provision and therefore common law rule applied to determine that spousal testimony from ex-wife was not prohibited. In *Hintner's appeal* in civil proceedings Court has reiterated absolute immunity rendering spouses incompetent as witnesses to testify in any manner which common law prohibition has been currently codified pursuant to foregoing Judicial Code provision

absent statutory exceptions not applicable to this case. *Kurland* court affirmed decree of Orphan's Court excluding spouse's testimony to support grantee's claim he was entitled to possession of wife's property by *Dower* under deed after her husband's death in a civil proceeding to establish specific performance of a contract to convey real estate. Subsection (b)(2) regarding recovery of marital or separate property refers only to re-enactment of Act of 1887 amended in 1913 limited entirely to removal of a then married woman's prohibition against owning and proceeding to protect or recover her separate property from husband. *Heckman v. Heckman,* 64 A.2d 442, 427 (Pa. 1906); *Dorsett v. Dorsett,* 75 A.2d 493 (Pa. 1910). See also, 42 Pa. C.S.A. Sec. 5923 involving spousal incompetence regarding confidential communications unless privilege waived upon trial only. Penumbra of Pennsylvania Constitutional provisions including right of privacy resulting from intimate marital relations are constitutionally protected from intrusion approving similar Federal Constitutional scheme reversing doctor's contempt. *In re "B" appeal of Dr. Roth,* 394 A.2d 419, 426 (Pa. 1978); *Com. v. Vartan,* 733 A.2d 1258 (Pa.1999) disqualifying Chief Justice of Pa. Supreme Court as witness as immune. In *US v. Ammar,* 714 F.2d 238, 258 (C.A. 3 1983), privilege against adverse spousal testimony prohibits one spouse from being compelled to testify against other which applies to all testimony of any kind relying on *Trammel*!

The Third Circuit's decision erroneously co-mingles separate and disparate theories involving petitioner's alleged obstruction of deposition process by not complying with invalid discovery orders; and insurance policy which preju-

diced Federal. Petitioner addresses these theories seriatim unequivocally demonstrating petitioner did not obstruct deposition process by not complying with any discovery orders and ambiguous and disputed contractual conditions under applicable Pennsylvania law under *Erie Doctrine* depriving petitioner of due process and jury trial involving material disputed factual and legal issues contrary to United States Constitution Art. III, Fifth and Seventh Amendments, F.R.C.P. 26, 30, 37 and 45, 56(c), F.R.E. 501 and state law.

Petitioner submits Third Circuit's decision affirming summary judgment clearly involving disputed material factual and legal issues founded on invalid orders purporting to compel pretrial discovery deposition from petitioner's wife and directing petitioner "arrange" for pretrial discovery deposition from his sons where Federal completely refused to comply with any Federal Rules of Civil Procedure and Rule 501 exclusively governing pretrial discovery depositions in adversarial proceedings including necessary issuance and personal service of subpoena together with simultaneous tender of $40.00 witness fee and mileage on these nonparties from an appropriate district court and contrary to Pennsylvania's long established fundamental public policy absolutely disqualifying petitioner's wife as a witness and over whom petitioner admittedly has absolutely no control, power authority or ability to compel the appearance of these individuals who personally refuse to voluntarily appeal and submit to personal jurisdiction of court in the exercise of their personal fundamental Constitutional individual liberties, privileges and immunities shall not serve as a foundation to deprive petitioner of his property without due process

of law involving important and fundamental federal questions that conflict with foregoing relevant federal court decisions including from this court and the *Erie Doctrine.* See also *Cellotex v. Catrell* 477 U.S. 317 , *Erie R.R. Co. v. Tompkins,* 304 U.S. 64; and has deprived petitioner of property without due process of law contrary to Fifth Amendment to United States Constitution; and jury trial under Seventh Amendment; and contrary to applicable Federal Rules of Civil Procedure including 26(b)(1), 30(a)(1)(b)(1), 37(a)(b)(1)(2), 45(a)(1)(2)(3)(b)(1)(e), 56(c) and F.R.E 501 and applicable controlling fundamental Pennsylvania Constitutional and individual liberty privileges and immunities.

Federal never issued or personally served petitioner's wife with a subpoena and simultaneous tender of $40.00 witness fee and mileage at any time throughout these proceedings necessary to compel her appearance including specifically at purportedly scheduled videotape pretrial deposition on March 18, 2005 serving as foundation for summary judgment! As a result, petitioner's wife - over whom petitioner has no control - personally refused to voluntarily appear for her pretrial deposition and voluntarily submit to court's personal jurisdiction over her or risk waiving her objection thereto or risk possible sanctions including contempt! Petitioner's wife is completely disqualified and deemed incompetent as a witness during coverture which is non-waivable by parties or court under applicable Pennsylvania codified common law provisions including her fundamental constitutional legal right to marital privacy precluding her from being sworn as a witness in these proceedings and she had no

obligation or necessity to personally appear in any proceeding including specifically the videotape pretrial discovery deposition to assert her disqualification and incompetence nor submit to any proceeding or risk any erroneous rulings or sanctions regarding nature or extent of this fundamental constitutional and legal right to privacy and immunity which would entail unnecessary and unreasonable annoyance, embarrassment, oppression, undue burden or expense or possibly require disclosure of information under seal or otherwise to a court where she has never been issued and personally served compulsory process together with simultaneous witness fee and mileage and is Constitutionally and legally entitled to be left alone! Federal never issued and personally served petitioner's emancipated sons with subpoena together with simultaneous tender of $40.00 witness fee and mileage at any time throughout these proceedings necessary to compel their appearance at pretrial discovery deposition scheduled for March 11, 2004. Petitioner's sons also personally refused to voluntarily appear for any videotape pretrial depositions on March 11, 2004 and submit to Court's personal jurisdiction over them or waive their objection thereto and refused petitioner's "good faith" request to voluntary appear! There is absolutely no evidence or any specific explicit findings demonstrating in any manner petitioner obstructed deposition process by not complying with any discovery orders which would serve as foundation to support summary judgment as a matter of law manifestly contrary to this court's foregoing decisions depriving petitioner's constitutional due process and jury trial rights and contrary to applicable Federal Rules of Civil Procedure and Evidence. There is absolutely no evidence petitioner has any capacity, power,

authority, control or ability to compel his wife and emancipated sons to appear for purported videotape pretrial discovery depositions when his wife and sons personally refused to appear in accordance with the foregoing reasons including exercising their personal individual rights, liberties, privacy, privileges and immunities including to be left alone particularly where Federal has never served them with compulsory process necessary to compel their attendance at a pretrial discovery deposition or any proceeding. Federal, itself, clearly recognized it lacked any basis whatsoever to seek contempt proceedings against petitioner's wife or sons under these circumstances where it has completely failed to comply with the obligatory civil procedural and evidentiary rules necessary to hold these individuals in contempt for their personal refusal to voluntarily appear for video pretrial discovery depositions. Petitioner submits this Court's foregoing decisions as well as express and plain provisions under applicable civil procedural rules including specifically Rule 37(b)(1) and 45(e) establish exclusive procedure and remedy when a non-party refuses to appear for pretrial discovery deposition as in this case. These discovery rules do not authorize court or opposing parties to sanction party because non-parties personally refuse to attend any pretrial discovery depositions (including for valid reasons as in this case) including failure by Federal to compel their attendance through issuance and service of a judicial subpoena and their personal exercise of fundamental Constitutional and legal individual rights, liberty, privacy, and immunity guaranteed under both Federal and State Constitutional and legal provisions by individuals who have separate legal identity as in this case. If these non-parties could not be cited for con

tempt, it follows a sanction cannot be Constitutionally and legally imposed on petitioner as a substitute where petitioner has absolutely no control or ability to compel their appearance over these non-parties who exercise their own personal choice to refuse to appear! As this Court explicitly recognized in *Trammel*, a wife is no longer regarded as chattel nor demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being and petitioner is simply unable to compel either his wife or emancipated sons to appear for a videotape pretrial deposition where, as here, they personally refused to do so with good reasons!

Petitioner submits Third Circuit's decision in affirming court's orders dated February 25, 2005 as foundation for summary judgment manifestly exceeds constitutional and legal limits under Judiciary Article III and Fifth and Seventh Amendments and this Court's plain explicit Evidentiary and Civil Procedural Rules exclusively governing pretrial discovery in cases and controversies in federal courts and this important federal question has not been explicitly decided but should be settled by this court and undermines this Court's decisions reiterating that valid court orders require both subject matter and personal jurisdiction contrary to foregoing decisions by this Court.

In *Catholic Conference*, specifically decided F.R.C.P. 45 grants federal district court power to issue subpoenas to non-party witnesses but subpoena power cannot be more extensive than its jurisdiction and specifically decided where district court does not have subject matter jurisdiction over underlying action and process not issued to determine

jurisdiction, process is void because judicial subpoena power is not only subject to specific Constitutional limits but also limitations inherent in tribunal that issues them because of the provisions of the Judiciary Article III relying on *Morton Salt.* Accordingly this court decided non-party which had been validly served with pretrial discovery subpoena not issued to determine court's subject matter jurisdiction could challenge a civil contempt citation for its refusal to obey a subpoena on the basis district court lacked subject matter jurisdiction. Court reversed 2nd Circuit's decision affirming district court's civil contempt orders based on "colorable" basis for exercising subject matter jurisdiction and remanded to circuit court to determine whether court had subject matter jurisdiction and, if not, to reverse civil contempt citations in their entirety because subpoena was void. Petitioner submits where Federal never issued or personally served petitioner's wife or emancipated sons together with simultaneous service of $40.00 witness fee and mileage regarding non-parties who were not within territorial limits of district court, the district court manifestly exceeded limits of its constitutional power under Article III as well as express limits of its power under Evidentiary and Civil Procedural Rules including Rules 30(a) (1), 37(a)(1)(2), (b),(1), and 45 (a) (1) (A-D) (2)(3) (b) (1) (2) (3)(e) and 28 U.S.C. Sec. 1821 (a) (1) (b) (c) (1) (2) (d) (1)(2), F.R.E. 501 plainly limiting court's power and authority to issue pretrial discovery orders respecting non-parties only where court acquires personal jurisdiction over them which admittedly did not occur in this case! Therefore, petitioner submits Court's order entered ostensibly compelling a deposition from petitioner's wife and denying motion for protective order dated February 25, 2005 does not con-

stitute a valid and legitimate order and could not impose an obligation on a non-party or petitioner; and the court clearly lacks personal jurisdiction and petitioner simply lacks any ability whatsoever to comply with such an order which was not directed to petitioner regarding these non-parties over whom he has no control! Petitioner also submits order dated February 25, 2005 directing petitioner to enter into an "arrangement" i.e., an agreement with non-party sons where court lacks personal jurisdiction over these non-parties because Federal failed to comply with the necessary Civil Procedural Rules to invest the court with personal jurisdiction including issuance and personal service of a subpoena does not constitute a valid and legitimate order contrary to foregoing authorities and express and plain limitations imposed on district court's power to enter valid pretrial discovery orders respecting non-parties over whom it lacks personal jurisdiction. More fundamentally, petitioner has no more ability, capacity, control or power to compel his wife or emancipated sons or any non-party to accept or enter into any arrangement or agreement to voluntarily appear for pretrial discovery deposition where non-parties personally refuse to do so as in this case and simply reject petitioner's good faith request. Petitioner is powerless and clearly unable to compel any non-party including his wife or sons to enter into an arrangement and voluntarily appear for a pretrial deposition when they have not been compelled to do so through issuance and service of compulsory process simply because they are related to him where they exercise their personal Constitutional free choice not to appear! Whether a Federal District Court is empowered to issue these pretrial discovery orders clearly contrary to limitations inherent in United States Dis-

trict Courts under Judiciary Article and the Federal Rules of Civil Procedure including specifically Rules 26,30,37 and 45 and F.R.E. 501 and contrary to Fifth and Seventh Amendments and use these invalid orders and petitioner's inability to comply therewith as the foundation to grant summary judgment involving admittedly disputed material factual and legal issues involve important questions of federal law that this court has not explicitly and specifically settled which should be settled by this Court or has decided an important federal question in a way in conflict with the foregoing relevant decisions of this Court and the United States Constitution and foregoing Federal Rules and applicable state law.

Petitioner Did Not Obstruct Deposition Process By Not Complying With The Insurance Policy Thereby Prejudicing Federal

There is absolutely no evidence or findings establishing as a matter of law petitioner obstructed deposition process by not complying with insurance policy thereby prejudicing Federal which at a minimum involved jury questions under applicable Pennsylvania law.

The undisputed evidence unequivocally establishes Federal never requested petitioner, his wife or sons provide any so call alleged "examination under oath" at any time from inception of loss on Sept. 17, 1999 until suit was commenced on Sept. 7, 2001! It is equally undisputed that after suit had been commenced Federal never requested petitioner, his wife or sons provide any alleged "examination under oath" what-

soever![1] After suit was commenced Federal belatedly purported to seek only videotape pretrial discovery depositions from petitioner's wife and sons including specifically on March 11 and March 18, 2005 purportedly to be conducted only in accordance with Federal Rules of Civil Procedure almost five years after loss. App.Y-Z. Under Applicable Pennsylvania law insurance company must promptly and reasonably make a demand to comply with any conditions including any alleged and disputed condition precedent. Where insurance carrier fails to promptly and reasonably or never demands insured or his wife or sons submit to any examination under oath as in this case, insurer will not be permitted to take advantage of alleged failure of insured to perform condition precedent which insurance company itself has caused including any alleged resulting prejudice therefrom and insurance company has waived and estopped to raise this alleged failure which presents jury questions under Pennsylvania law. *See Brakeman; Rohm; Fedas: Isaac; Seibel; Butler.*

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[1] A purported "examination under oath" provision is substantially different from a videotape pretrial discovery deposition as former involves a purely voluntary proceeding, not in context of adversarial case, limited entirely to information regarding claimed losses under policy without sanctions including contempt whereas pretrial discovery procedures require compulsory process for witness pursuant to case or controversary regarding any matter relevant to claim or defense of a party subject to sanctions including contempt and fines, and are not interchangeable, inter alia.

Federal repeatedly admitted petitioners sustained his losses to premises owned exclusively by him due to hurricane pursuant to exhaustive inspections including expert examinations and in accordance with testimony from their only designated witness and its own records. Petitoner's wife and emancipated sons have absolutely no legal or equitable interest including any insurable interest in damaged premises or any real estate owned by petitioner and are not parties, insureds or witnesses which minimally involve jury issues under applicable state law. Admittedly, petitioner is entitled to separate coverage for his losses. Petitioner has absolutely no capacity, power, ability or control over his wife and emancipated sons or any obligation to produce them in any proceeding including any purported "examination under oath" and in particular where they personally refuse to voluntarily appear or participate in any proceeding. Federal materially breached contract discharging petitioner from any obligation to perform any conditions including alleged examination under oath provision! Federal never notified petitioner or his wife or sons failed to comply with any conditions. After suit had been commenced, Federal attempted to belatedly pursue only pretrial discovery proceedings governed exclusively under Federal Evidentiary and Civil Procedural Rules and specifically recognized it must comply with applicable Rules of Civil Procedure to compel any non-party to appear for pretrial discovery depositions pursuant to subpoena. The disputed and clearly ambiguous provision regarding examination under oath at most merely affords an amorphous right to examine under oath as often as it may reasonably require you, family members or other members of your household and have them subscribe to same which is

not self-executing but refers only to a possibility that Federal may initiate and make a reasonable request seeking an examination under oath from petitioner, his wife or other family members or members of the household and have them subscribe to same: and where Federal never requested and any such examination, petitioner did not fail to comply with this alleged condition nor did any member of his family! There is no express "cooperation" requirement or explicit requirement petitioner produce any family or other member of his household and have them subscribe to same and in particular where petitioner lacks any ability, capacity, control, power or authority to compel individuals with separate legal identities who personally choose to exercise their Constitutional individual liberties, immunities and privileges and personally refuse to voluntarily appear and submit to any examination under oath had Federal sought one at any time which it never did! Petitioner could no more compel appearance of wife or emancipated sons for examination under oath had Federal requested one, than he has capacity, control, power, authority or ability to compel his wife or sons to appear for scheduled videotape pretrial depositions at any time throughout these proceedings simply because of familial relationship where these separate legal individuals freely choose to exercise their individual liberties and privileges not to appear. There is absolutely no allegation or evidence petitioner obstructed deposition or colluded with his wife or sons nor any express or implicit finding to that effect.

Petitioner submits disputed examination under oath contractual provision is entirely inapplicable and immaterial to

adversarial Federal District Court proceedings governed exclusively under Federal Rules of Civil Procedure and Evidence and fundamental Federal Constitutional limitations imposed on these tribunals regarding limits of valid exercise of judicial subpoena power under Judiciary Article III and Fifth, and Seventh Amendments to United States Constitution and decisions by this Court and applicable Pennsylvania law under *Erie Doctrine* and court manifestly erred in granting summary judgment against petitioner because petitioner's wife and emancipated sons chose to exercise their fundamental Constitutional individual liberties and privileges not to voluntarily appear for pretrial discovery depositions or any other proceeding had one been initiated by Federal and petitioner is simply unable to compel their appearance either pursuant to pretrial discovery proceedings or alleged contractual provisions and issues involved disputed material, issues of fact and law precluding summary judgment.

Decision below creates split between circuits and sanctions egregious departure from accepted and usual course of judicial proceedings as to call for Court's exercise of supervisory power.

Every circuit has specifically decided pursuant to plain meaning of Federal Rules of Civil Procedure including Rule30(a)(1),37(a)(2)(b)(1),45(a)(1)(A)(B)(C)(D),2 (B)(b)(1)(c) requires a duly issued subpoena from court with territorial jurisdiction where deponent is present must be issued and personally served together with simultaneous tender of $40.00 witness fee and mileage necessary to compel non-party to participate in pretrial discovery proceedings and specifically appear for pretrial depositions without which

court lacks personal jurisdiction necessary to entertain or grant sanctions exclusively limited to contempt against disobedient non-party only for failure of non-party to comply with compulsory process. *FTC*; *McGill v. Duckworth*, 944 F.2d 344, 353, (7 Cir. 1991), Cert.Den.503 U.S. 907; *Firefighter Fighter's Institute*; *In re: Dennis; C.F. & I Steele Corp*; *Natural Gas Pipeline of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (Fifth Circuit 1993) Cert.Den. 510 U.S. 1073 (1994). Petitioner submits Circuit's decision affirming court's orders dated Feb. 25, 2005 compelling pretrial deposition of petitioner's wife and directing petitioner "arrange" for pretrial deposition of petitioner's emancipated sons over whom petitioner has absolutely no capacity or ability to control, where Federal failed to issue or serve these non-parties over whom court lacks personal jurisdiction clearly conflicts with foregoing Circuit decisions specifically and repeatedly deciding where court lacks personal jurisdiction over non-parties it may not consider motions under Rule 37 or issue orders or sanctions against non-parties involving pretrial discovery proceedings and specifically depositions involving non-parties to whom compulsory process has never been issued or validly served. This Circuit's decision not only directly conflicts with foregoing circuit decisions and virtually all district court decisions throughout country but clearly undermines Court's plain limit of lawful power and authority conferred by Court pursuant to enabling statues authorized by Congress pursuant to F.R.C.P. 26, 30, 37, 45, F.R.E. 501 and potentially and actually serves to trample on fundamental constitutional liberties and privileges afforded parties and non-parties to refuse to voluntarily appear or submit to limited personal jurisdiction invested in district

court at risk of punishing innocent parties such as petitioner in this case who has effectively been sanctioned because non-parties have exercised their Constitutional and individual liberties and privileges not to voluntarily appear and submit to personal jurisdiction of district court and waive these fundamentally, Constitutionally guaranteed individual liberties, immunities, privacy and privileges and risk sanctions including contempt as a result of a party's failure to comply with the Federal Evidentiary and Civil Procedural Rules necessary to compel their attendance at pretrial discover proceedings including depositions and sanctioned egregious departure from accepted and usual course of judicial proceedings by lower court as to call for exercise of Court's supervisory power.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A – SUR PETITION FOR REHEARING, DATED JANUARY 3, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-1814, 06-1320, 06-1356

ROBERT J. MURPHY,
Appellant in No. 05-1814
v.
FEDERAL INSURANCE COMPANY

ROBERT J. MURPHY,
Appellant in No. 06-1320
v.
FEDERAL INSURANCE COMPANY

ROBERT J. MURPHY,
Appellant in No. 06-1356
v.
FEDERAL INSURANCE COMPANY

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 02-02541)
Honorable Petrese B. Tucker, District Judge

Submitted under Third Circuit LAR 34.1(a)
November 9, 2006

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, and GREENBERG, Circuit Judges

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The petition for rehearing filed by appellant, Robert J. Murphy, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: January 3, 2007

1wc/cc: Robert J. Murphy, Esq.
Edward M. Koch, Esq.
Michael J. Plevyak, Esq.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 05-1814, 06-1320, 06-1356

ROBERT J. MURPHY,

Appellant

v.

FEDERAL INSURANCE COMPANY

On Appeal from the United States District for the Eastern District of Pennsylvania (D.C. Civ. No. 02-02541)
Honorable Petrese B. Tucker, District Judge

Submitted under Third Cirucit LAR 34.1 (a)
November 9, 2006

BEFORE: SLOVITER, CHAGARES, and GREENBERG, Circuit Judges

JUDGMENT

This cause came on to be considered on the record on appeal from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1 (a) on November 9, 2006. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the orders of the district court of February 25, 2005, January 18, 2006, and January 24, 2006, are affirmed and the appeal in No. 05-1814 is dismissed.

Cost taxed against appellant.

ATTEST:

Marcia M. Waldron
Clerk

DATED: November 20, 2006

APPENDIX B – OPINION OF THE COURT, FILED NOVEMBER 20, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 05-1814, 06-1320, 06-1356

ROBERT J. MURPHY,

Appellant

v.

FEDERAL INSURANCE COMPANY

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civ. No. 02-02541)
Honorable Petrese B. Tucker, District Judge

Submitted under Third Circuit LAR 34.1 (a)
November 9, 2006

BEFORE: SLOVITER, CHAGARES, and GREENBERG, Circuit Judges

(Filed: November 20, 2006)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

These matters come on before this court on three separate appeals from a single district court case that the clerk of this court consolidated by order entered January 31, 2006. In view of the unusual circumstances here we set forth the history of the case at considerable length. Appellant, Robert J. Murphy ("Murphy"), brought this action in the Philadelphia County Common Pleas Court against Federal Insurance Company ("Federal") for, as he explains, "damages to real premises [at 7 Coopertown Road, Haverford, Pennsylvania solely] owned by [him] from Hurricane Floyd on or about [September 17, 1999] pursuant to [an insurance] policy [issued by Federal] indemnifying [him] for physical losses to [the] premises from all risks including a hurricane." Appellant's br. In No. 05-1814, at 7. The dispute largely focuses on damages to the property that Murphy attributes to a tree falling on it during the hurricane.

Notwithstanding Murphy's sole ownership of the Haverford property, the Federal policy listed both Murphy and his wife, Kathleen Murphy, as the named insureds. Though acknowledging that its policy covered the premises at the time of the loss, Federal questions whether the tree fell and caused damage as Murphy asserts. Quite to the contrary, it contends that its inspection of the premises several months after the hurricane did not reveal evidence that one might have expected to see if a tree had fallen during the hurricane and caused damage.

Federal removed the action to the district court on diversity of citizenship grounds under 28 U.S.C. § 1441. Thereafter Murphy moved in the district court to remand the case to the state court, but the district court denied that motion.

Murphy appealed to this court from the order denying the motion to remand, but we dismissed the appeal as, plainly, it was interlocutory and we thus lacked jurisdiction over it.

The case then proceeded in the district court. Murphy in that court stated claims both at common law and under the Pennsylvania insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371 (West 1998). In the district court there was considerable controversy over Federal's attempt to take the depositions of Kathleen Murphy and Murphy's sons. Federal, in view of its assertion that she and the sons live or at least lived in the Haverford premises, understandably contends that they may have information about the case. On the other hand, Murphy asserts that Kathleen "[a]t all time material hereto and on the date of the loss was not occupying and/or present on the premises." App. In No. 05-1814, at 64. Moreover, he contends that his wife "has no knowledge, information or interest whatsoever in this matter or any connection with this matter and [is] incompetent and protected by the marital privilege and [the] Court clearly lacks power, authority, or jurisdiction over this non-party who has never been personally served at any time including tender of fee and mileage." Appellant's br. in No. 05-1814, at 10. He also questions whether Federal should be able to take the other depositions it sought.

In fact, Federal has not been successful in its attempts to take the depositions of Kathleen Murphy or Murphy's sons, an inability it attributes to Murphy obstructing its attempts to do so. On the other hand, Murphy attributes Federal's inability to take the depositions to its procedural failures in arranging for them and contends that, in any event, the

depositions should not have been taken. These deposition problems led the parties to file cross-motions, with Federal seeking to obtain orders enabling it to take the depositions, and Murphy seeking to bar, or at least limit, them in part though the means of a protective order with respect to Kathleen. In response to the motions, on February 25, 2005, the district court signed an order, entered on February 28, 2005, granting Federal's motion to compel Kathleen Murphy's deposition and denying Murphy's motion for a protective order. In a separate order on the same day, the court ordered that the depositions of his sons were to be taken. On March 10, 2005, Murphy appealed from those orders.

After the appeal was docketed in this court, our clerk sent a letter to the attorneys[1] advising them that the court had listed the appeal for possible dismissal due to a jurisdictional defect, as it was interlocutory, and inviting their comments on this possibility. Both parties responded to the clerk following which she submitted the case to a motions panel of this court for consideration of our jurisdiction. On August 24, 2005, the motions panel entered an order providing that the "appeal shall proceed only as to the denial of the protective order related to Kathleen Murphy and this issue is referred to the merits panel. All other orders appeal are dismissed from this appeal." In entering this order, the motions panel referred both the jurisdictional problem with respect to an appeal from the denial of a protective order and,

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[1] Murphy, who is an attorney at law, has been representing himself in this litigation.

if the court has jurisdiction, the merits of the appeal on that issue to the merits panel.[2]

For almost one year after Murphy initially appealed, the case went forward on parallel tracks for during that period the proceedings in the district court continued. In the district court Murphy filed an unsuccessful motion for a stay or for reconsideration of the February 25, 2005 orders. But prior to the district court denying that motion, Federal moved for summary judgment because, in its view, Murphy had not complied with his obligation under the insurance policy inasmuch as he had obstructed its efforts to obtain the depositions. Federal conceived that Murphy's conduct relieved it of its obligations under the policy which provided for examinations under oath of the insured and their family members.[3] In the alternative, it moved for an order of dismissal under Fed. R. Civ. P. 37 as a sanction for what it believed was Murphy's failure to comply with discovery orders. Murphy countered with a cross-motion for a partial summary judgment.

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[2] This order conformed with Third Circuit IOP 10.3.5 which provides that if a motions panel "votes not to grant [a] motion [to dismiss for lack of jurisdiction] the motion is referred by order, without decision and without prejudice, to the merits panel."

[3] The policy provided that "[Federal has] the right to examine under oath as often as [it] may reasonably require you, family members and other members of your household and have them subscribe the same." App. In 05-1814, at 119.

On January 18, 2006, the district court granted Federal's motion for summary judgment and denied Murphy's, entering judgment in Federal's favor on January 24, 2006. The court took this action as it believed that Murphy's conduct in not cooperating with Federal materially breached his obligations under the insurance policy and thereby prejudiced Federal so that Murphy could not recover under the policy. Murphy timely appealed from the January 18, 2006 order in No. 06-1320 and appealed from the January 24, 2006 order in No. 06-1356. As we have indicated, the clerk has consolidated these two appeals with each other and with the earlier appeal in No. 05-1814. We dispose of all three appeals in this opinion.[4]

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[4] Preliminary we are constrained to make the following observation about the briefing in this case. Murphy has filed four briefs addressing the merits of the three appeals, two opening briefs and two reply briefs, and Federal has filed two answering briefs as it is the appellee in both appeals. Throughout his briefs, Murphy has used the word "admittedly" to describe what he sees as his own appropriate conduct and Federal's missteps as well as what he asserts are its legal and factual concessions. This style has enhanced our difficulty in understanding these confusing matters for Federal frequently is not admitting what Murphy suggests it admits. For example in Murphy's opening brief in Nos. 06-1320/1356, at 3 he indicates that his family members "admittedly," among other things, are not "witnesses." Of course, Federal's contention is exactly to the contrary and, indeed, in a sense, the parties' dispute about the family's potential knowledge is what this appeal is about. Notwithstanding Murphy's continuous misuse use of the word "admittedly," we have endeavored to understand both parties' contentions and are confident that we have not attributed positions to them that they have not taken.

The first issue which we address is whether we have jurisdiction over the appeal in No. 05-1814 to the extent that the motions panel has not dismissed it already. As we have indicated, the motions panel dismissed that appeal on August 24, 2005, except to the extent that Murphy took the appeal from the denial of a protective order. Murphy believes that we have jurisdiction over the appeal, particularly to the extent that the motions panel did not dismiss it, under the collateral order doctrine.[5]

We reject Murphy's contention. We repeatedly have recognized that as "a general rule, discovery orders are not final orders of the district court for purposes of obtaining appellate jurisdiction under 28 U.S.C. § 1291." Bacher v. Allstate Ins. Co., 211 F.3d 52, 53 (3d Cir. 2000) (internal quotations and citations omitted). Thus, the collateral order doctrine rarely can apply to appeals from discovery orders. But there is a narrow exception to the general rule "when a party appeals a discovery order involving information which the party claims to be privileged or to constitute a trade secret." Id. Murphy contended in the district court that "any and all information communicated by [him] to his wife involving the foregoing subject loss to the real premises clearly involve confidential communications between husband and wife which are clearly privileged in accordance with applicable

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[5] Understandably Murphy's brief on the merits in No. 05-1814 focuses on the protective order aspects of the appeal because he filed that brief after the motions panel dismissed the rest of the appeal. We are confident, however, that Murphy must have believed that we had jurisdiction over all aspects of the deposition orders or he would not have appealed from them.

law...." App. In No. 05-1814, at 66. This contention well may be correct because 42 Pa. Cons. Stat. Ann. § 5923 (West 2000) provides that, in general, "in a civil matter neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other."

Nevertheless, section 5923 does not help Murphy because, as Federal recognized in the district court, "any marital privilege can be sufficiently protected through traditional objections made at the deposition." App. In No. 05-1814, at 104. Moreover, Federal acknowledges in its brief in No. 05-1814, at 3, that the order of February 25, 2005 with respect to Kathleen Murphy, "is simply a procedural ruling requiring [her] to submit to [a] deposition and does not require the waiver of any marital privilege asserted by Murphy." Consequently, the appeal at No. 05-1814 does not challenge a district court order permitting Federal to obtain privileged information. Thus, the collateral order doctrine is inapplicable to any aspect of the appeal brought from the February 25, 2005 orders and will not support our exercise of jurisdiction.

Murphy also argues that the February 25, 2005 orders, with respect at least to Kathleen Murphy, purport "to specifically enforce an alleged and disputed contractual undertaking" and, to that extent, are a "classic form of appealable equitable injunctive relief." Appellant's br. in No. 05-1814 at 5. This argument suggests that we should exercise jurisdiction under 28 U.S.C. § 1292 (a)(1). We reject that contention because the February 25, 2005 orders neither grant nor deny any of the relief sought in this action and thus are not appealable injunctions within the meaning of that section. See In re Pressman-Gutman Co., 459 F.3d 383, 392-93

(3d Cir. 2006). Overall, we are satisfied that we do not have jurisdiction in No. 05-1814 to the extent that the motions panel did not dismiss that appeal and that we never had jurisdiction over any aspect of that appeal. Therefore, insofar as that appeal remains pending we will dismiss it.

The circumstances that the orders of February 25, 2005, were not appealable when Murphy took the appeal from them is of critical importance and has ramifications beyond the requirement that we dismiss the appeal. In Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985), we pointed out that as a general rule "the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." Inasmuch as the district court granted summary judgment in part because Federal never obtained the depositions it sought to take, arguably the district court's jurisdiction to enter summary judgment would have been in doubt if Murphy properly had taken the appeal in No. 05-1814.

There is, however, an exception to the general rule that we set forth in Venen, namely "that the jurisdiction of the lower court to proceed in a cause is not lost by the taking of an appeal from an order or judgment which is not appealable." Id. at 121 (internal quotations and citations omitted). Accordingly, inasmuch as we do not have and never did have jurisdiction over the appeal in No. 05-1814, that appeal did not preclude the district court from proceeding with the case and granting summary judgment.

There is yet another jurisdictional twist in this case which, ironically, causes us to consider the very issues raised in No. 05-1814 with respect to the February 25, 2005 orders, even though the motions panel together will have dismissed that appeal in its entirety. We repeatedly have recognized that a notice of appeal from a final judgment is construed as including orders entered prior to the judgment if they are related to the specified order from which the appellant took the appeal, the intention to appeal from the prior order is apparent, and the opposing party has not been prejudiced by such a construction. See, e.g., Pacitti v. Macy's, 193 F.3d 766, 777 (3d Cir. 1999). The orders of February 25, 2005, are within that category as clearly they are related to the opinion granting summary judgment and, indeed, were the very foundation for it. Moreover, Murphy's intention to appeal from the February 25, 2005 orders hardly could be clearer as he said as much in his notice of appeal in No. 05-1814. Consequently, the appeals in No. 06-1320 and No. 06-1356 that Murphy properly took bring the February 25, 2005 orders up for review in all their aspects, even to the extent that the motions panel dismissed the appeal from them despite the fact that the notices of appeal in No. 06-1320 and No. 06-1356 did not mention the February 25, 2005 orders.

We do not regard this treatment as unfair to Federal for two reasons. First, Federal has been well aware that Murphy objects to all aspects of the orders for depositions. Second, in his brief in Nos. 06-1320 and 06-1356, Murphy referenced his discovery order contentions. Thus, we will consider on the merits all issues raised on these three appeals.

On the appeal from the summary judgment, we undoubtedly exercise plenary review. See Dilworth v. Metorpolitan Life Ins. Co., 418 F.3d 345, 349 (3d cir.2005). In this review we use the same standard as the district court. Accordingly, pursuant to Federal Rule of Civil Procedure 56 (c), we can affirm the summary Judgment only if the there is no dispute of material fact and Federal is entitled to a judgment as a matter of law. In our review we review the record in the light most favorable to Murphy. See Dilworth, 418 F.3d at 349.

The parties, however, disagree with respect to our standard of review of the February 25, 2005 orders, at least with respect to the denial of a protective order. Murphy contends that our standard of review is plenary on that issue and Federal asserts that we review it on an abuse of discretion basis, citing Shingara v. Skiles, 420 F.3d 301, 305 (3d Cir.2005). In some cases the standard of review may be critical, as a court of appeals might affirm an order exercising deferential review that it might reverse on plenary review. But this case does not come within the category as we are satisfied that, regardless of our standard of review, we must affirm the orders of the district court in all respects.

We now reach the merits of the appeal, an undertaking we initiate by describing the district court opinion. The district court, after setting forth the background of the case and legal standards implicated, described Federal's motion for summary judgment. It indicated that Federal contended that contended that Murphy could not bring an action under the policy unless he complied with its provisions which included an obligation to cooperate in the processing of a claim in

-cluding requiring members of his family to submit to examinations under oath. It further contended that Murphy breached this obligation and thus could not recover. On the other hand, Murphy contended that the examination provision was not a condition precedent to his recovery.

The court held that the policy unambiguously provided that Federal could obtain the depositions of Murphy's family. It could take Kathleen Murphy's deposition because she was an insured and, as Murphy's spouse, was within the definition of "you" in a policy provision providing that Federal could examine "you," and could take Murphy's sons' depositions because they were "family members" of Murphy's household. Under the policy, in these capacities Federal could examine all of them. Indeed, the court believed that the fact "that the Federal Policy requires deposition testimony of Murphy's family is compelled as a matter of logic and cannot be reasonably disputed." App. In Nos. 06-1320/1356, at 28. Therefore, inasmuch as Murphy did not cooperate in the taking of the depositions the court believed that "the only issue for the Court is whether Murphy's failure to cooperate caused Federal substantial prejudice." Id. at 30. The court did not have any problem with this question as it concluded that "[a]s a result of Murphy's disregard for his duty to cooperate, Federal's Motion for Summary Judgment is granted." Id. at 31. Of course, the court also denied Murphy's cross-motion for summary judgment as Murphy's failure to cooperate relieved Federal of any duty it owed him.[6]

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[6] We note that Murphy seems to contend that Kathleen Murphy is not an insured on the Federal policy, at least with respect to the

After our extensive review we will affirm and, except as follows, we have nothing to add to the district court's opinion. Murphy's argument, though long and involved, principally is as follows: "Plaintiff's admittedly and in good faith reasonably/substantially complied with all conditions." Appellant's br. in Nos. 06-1320/1356, at 11. His problem is that though he might "admit" that he complied with the policy conditions, surely Federal does not. Federal had a right to take the depositions it sought to take, particularly those of Kathleen Murphy as both she and Murphy were parties of the insurance policy, and thus the district court correctly entered the February 25, 2005 orders. Then, when Murphy continued to obstruct the deposition process, the court was justified in entering the order of January 18, 2006, granting Federal summary judgment and denying Murphy's motion for summary judgment.

Haverford property, because she did not apply for it. We reject that contention. In fact, the policy named Kathleen Murphy as an insured and there is no indication in the record of which we are aware that, prior to Hurricane Floyd, she was removed or even sought to be removed as an insured from the policy or that her obligation under the policy was limited. Moreover, even though Kathleen Murphy was not an owner of the Haverford premises there may have been good reason to list her as an insured as the policy covered losses to contents of the premises, in particular mentioning jewelry and furs the coverage for which there was a substantial premium. Thus, it is possible that even though this action does not include a claim for loss of personal property she had such property in the insured premises. We also note that the policy covered property in Longport, New Jersey. It is possible that Kathleen Murphy was an owner of that property.

Our study of this matter has led us to conclude that even though there obviously are disputes of fact in this case with respect to the actual claim for coverage and the timeliness of Murphy's notice of his loss to Federal, there is no escape from the conclusion that notwithstanding his denial that he has done so, Murphy has been obstructing the proceeding by not complying with the discovery orders and the insurance policy, thereby prejudicing Federal. Thus whatever might be true as to other facts, we are satisfied that based on a set of irrefutable facts, Federal is entitled to a judgment as a matter of law.

In reaching our result we are mindful of Murphy's contention that his wife's testimony, even if she appeared for a deposition, would be privileged but we see no reason why, even if this is so, she did not have to appear for the deposition because, as Federal correctly recognizes, an order requiring her deposition would not preclude her from asserting a marital testimonial privilege at the deposition. Moreover, by contract Federal had a right to take her deposition.[7]

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[7] We are aware of 42 Pa. Cons. Stat. Ann § 5924 (West 2000) which provides that "[i]n a civil matter neither husband nor wife shall be competent or permitted to testify against each other." In this case in view of the circumstance that both Murphy and his wife are insureds under the policy, which compels their availability for depositions, we have no need to explore the ramifications of that statute which by contract cannot apply here. We only state on this point that we cannot believe that the Pennsylvania legislature ever conceived that in the highly regulated insurance industry the terms of policies that the state authorities permitted to be sold would not be enforced even if, as here, they required spouses to

Finally we point out that we are aware that Murphy claims that his wife and sons do not have any material knowledge regarding this case. Perhaps this is so, but surely Federal does not have to take his word on this point. After all, it would be expected that an insured's immediate family would have seen damage to their husband's and father's property caused by a falling tree during a hurricane for an event of this kind surely would be of interest to the immediate family of the insured. Certainly it must not have seemed to the district court and it does not strike us that the attempt to take the depositions was a proverbial fishing expedition. Moreover, if Kathleen and the sons did not have any knowledge useful in this case they could have said so at their depositions.

For the foregoing reasons the orders of February 25, 2005, January 18, 2006, and January 24, 2006, will be affirmed and the appeal in No. 05-1814 will be dismissed.

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testify about his or her spouses to testify about his or her spouse's losses. In this regard we point out that in Pennsylvania it is not lawful for an insurance company to sell insurance policies "until the forms of the same have been submitted to and formally approved by the Insurance Commissioner." 40 Pa. Stat. Ann. § 477 (b) (West 1999).

APPENDIX C – CIVIL JUDGMENT, DATED JANUARY 23, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY	:	CIVIL ACTION
	:	
v.	:	
	:	
FEDERAL INSURANCE COMPANY	:	NO. 02-2541

CIVIL JUDGMENT

Before the Honorable PETRESE B. TUCKER

AND NOW, this 23rd day of January, 2006, in accordance with this Court's Memorandum and Order filed January 18, 2006 (Document No. 64),

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Defendant Federal Insurance Company and against Plaintiff Robert J. Murphy.

BY THE COURT

ATTEST:_____
Alisa Ross
Deputy Clerk

APPENDIX D – MEMORANDUM AND ORDER, DATED JANUARY 18, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 02-2541
	:	
FEDERAL INSURANCE COMPANY,	:	
Defendant.		

Tucker, J. January 18, 2006

MEMORANDUM AND ORDER

Presently before this Court are Defendant's Motion for Summary Judgment or in the Alternative Dismissal Under FED. R.CIV. P. 37 (Doc. 36), Plaintiff's Response in Opposition and Memorandum in Support of Its Motion for Summary Judgment (Doc. 39), and Defendant's Response to Plaintiff's Motion for Summary Judgment (Doc. 40). For the reasons set forth below, the Court will grant Defendant's Motion for Summary Judgment and Deny Plaintiff's Motion for Summary Judgment.[8]

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[8] Defendant alternatively moved for dismissal under FED. R. CIV. P. 37, citing Murphy's "well-documented pattern of dilatory conduct." Def. Mem. at 19. It is not necessary to decide this issue for

I. FACTUAL AND PROCEDURAL BACKROUND

From the evidence in the record, the pertinent facts are as follows. Plaintiff, Robert Murphy ("Murphy") filed this claim for breach of an insurance contract against Defendant, Federal Insurance Company ("Federal") on March 28, 2002. The claim centers around a homeowners insurance policy (the "Federal Policy") that Murphy purchased from Federal to insure his home located at 7 Coppertown Road, Haverford, Pennsylvania (the "Property"). On September 17, 1999, Murphy suffered physical losses on the Property due to a hurricane. According to Murphy, the physical damage to the Property included damage to the garage, walls, floors, pool and the surrounding areas. Federal initiated an investigation of Murphy's claims, which included an examination of the Property.

Both parties claim that the other party breached the conditions in the Federal Policy. Murphy claims that Federal breached its duty under the Federal Policy when it failed to reasonably and promptly investigate the damages to Property. Murphy further contends that Federal breached the terms of the Federal Policy when it failed to evaluate and pay all of Murphy's alleged damages. However, Federal denies

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the reasons outlined below. Nonetheless, the Court notes that Murphy's conduct would also qualify for dismissal under Rule 37 because of his refusal to comply with the discovery orders of this Court. See Poulis v. State Farm Fire & Cas. Co., 747 F. 2d 863 (3d Cir. 1984) (affirming the dismissal of an insureds' insurance claim as a sanction for the their attorney's dilatoriness in responding to discovery requests and in filing court ordered documents).

any unnecessary dely, arguing that it was willing to investigate and adjust Murphy's losses, but that Murphy's lack of cooperation prevented it from conducting an adequate investigation. Among the duties Federal claims Murphy breached was the failure to timely notify it (Federal) of the claim, and failure to submit certain documents relevant to the investigation of the claim. Furthermore, Federal claims that Murphy refused to allow a full inspection of the Property.

Moreover, Federal asserts that Murphy refused to allow it to depose many key witnesses to the Property's damages, including Murphy's wife, Kathleen Murphy, and Murphy's sons. As a result, Federal filed motions to compel the deposition testimony of Mrs. Murphy and Murphy's sons with this Court. *See* Docs. 18 & 23. After carefully considering the arguments of the parties, the Court granted Federal's motions to compel. Despite the orders of this Court, neither the witnesses nor Murphy appeared for the depositions. Subsequently, the parties filed the Motions for Summary Judgment now before this the Court.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV.P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986). A factual dispute is "material" if it might affect the outcome of the case under the governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56 (e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which hat party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW, inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255. Credibility determinations, the

weighing of evidence, and the drawing of legitimate inferences from facts must await trial. *Id.*

III. Discussion

A. Federal's Motion for Summary Judgment

In support of its Motion for Summary Judgment, Federal argues that its duty under the Federal Policy is not triggered as a matter of law because Murphy has failed to comply with a condition precedent to coverage. Def.'s mem. at 10-12. Federal focuses on a provision in the Federal Policy that (it reasons) requires members of Murphy's family to submit to "examination[s] under oath" as a condition to coverage, (the "Examination Provision"). *See* Def.'s Mem. at Ex. F. The Federal Policy further states the Murphy may not bring legal action against Federal unless he complies with all policy conditions. *Id.* According to Federal, the Examination Provision creates a duty to cooperate with the investigation of Murphy's claim, a duty Murphy breached when he refused to make his wife and sons available for depositions. Def.'s Mem. at 12-19. Federal submits that because Murphy has not made his family members available for their depositions, he is in material breach of a policy condition, and his action should be dismissed. *Id.* Murphy interprets the Federal Policy differently, arguing that the Examination Provision creates neither a condition precedent to coverage nor a duty to cooperate with Federal's request to depose his family members. Pl.'s Mem. at 8-12. Moreover, Murphy submits that Federal has not suffered prejudice due to his failure to cooperate. *Id.* Therefore, the issue for this Court whether the

Federal Policy's Examination Provision creates a duty to cooperate and, if so, did Murphy breach that duty.

1. Murphy's Duty to Cooperate

Initially, the Court must determine whether the Federal Policy actually requires the depositions of Murphy's family members. This is an issue of contract interpretation. Interpretation of an insurance contract is called "a question of law that is properly decided by the court." *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900-01 (3d Cir. 1997) (quoting Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (1983)). To determine whether a contract is ambiguous, a court must examine the questionable term or language in the context of the entire policy and decide whether the contract is reasonably susceptible to different constructions. *Id.* Where a provision of a policy is ambiguous, the provision should be construed in favor of the insured, here Murphy. *Id.* However, if the terms of the policy are clear and unambiguous, this Court must give effect to the plain language of the agreement. *Id.*

It is clear to the Court that the Federal Policy requires the depositions of the Murphy family members. The contested language is contained on Page Y-5 of the Federal Policy. Def.'s Mem. at Ex.F. The section states that Federal has " the right to examine under oath as often as [they] may require *you, family members, and other members of your household.*" *Id.* (emphasis added). The Federal Policy clearly defines the identity of those parties. "You" is defined in the Federal Policy as "the person named in the Coverage Summary, and a spouse who lives with that person." *Id.* B

oth Murphy and his wife are listed on the Coverage Summary page. *Id.* The definition of "family member" is equally clear. In the Federal Policy, the term family member "means your relative who lives with you, or any person in your care...who lives with you." *Id.* This language covers both of Murphy's sons because they were residents of the Property at the time that Murphy entered into the insurance contract. The fact that the Federal Policy requires deposition testimony of Murphy's family is compelled as a matter of logic and cannot be reasonably disputed.

Nonetheless, Murphy does no make an attempt to dispute this reasonable interpretation of an insurance contract that he willingly entered. In his memorandum, Murphy makes the conclusory assertion that the Examination Provision is a "disputed policy provision" Pl.'s Mem. at 10. Murphy's assertion is premised upon the fact that the Examination Provision is not included in his copy of the policy. Pl.'s Obj. at ¶ 10. Unfortunately for Murphy, the evidence of this case do not support his claim. Murphy disputes the validity of the Examination Provision, contending that "[the] copy of the policy provided to [him]... does not contained the alleged disputed provisions upon which defendant purports to rely in support of its motion." Pl.'s Mem. at 10. This fact alone, Murphy reasons, creates an issue of material fact. *Id.* In its motion for Summary Judgment, Federal attached the *entire* Federal Policy, which includes the examination Provision. Def. Mem. at Ex. F. Federal includes an affidavit which supports the Federal Policy's authenticity. *Id.* Murphy provides no proof that the policy that he submitted was the correct version or that Federal's Policy was inaccurate. The mere

fact that Murphy offers an incomplete copy of the Federal Policy does not create an issue of fact regarding a provision in the complete copy. While Murphy may believe that a material issue of fact exists regarding his duty under the Federal Policy, wishing does not make it so. The words in the Federal policy could not be clearer, the Federal Policy requires examinations under oath.

Murphy's attempt to avoid summary judgment is further undermined by his own words. In a previous memorandum of law to this Court, Murphy concedes that the "sworn statements...are *mandated* under the policy provisions." Def.'s Mem. at Ex. K (emphasis added). Amazingly, Murphy now tries to argue the exact opposite position. It is clear to this Court that there is no material issue of fact regarding the interpretation of the Examination Provision of the Federal Policy. Therefore, the Court concludes, as a matter of law, that the Federal Policy mandated examinations under oath. Because Murphy did not comply with this provision, he is in breach of his duty to cooperate under the Federal Policy.

2. Prejudice to Federal

Having determined that the Federal Policy requires examinations under oath, the Court will now examine the effect of Murphy's non-compliance on Defendant Federal. Here, Federal reasons that because Murphy breached his duty to cooperate with the insurance investigation it is entitled to summary judgment. Def.'s Mem. at 10-11. Federal reasons that summary judgment is appropriate because Murphy's refusal to make his family members available for deposition

testimony, hindered its ability to investigate Murphy's claim of loss. *Id.* Therefore, the duty to make payment on Murphy's claims was not triggered. *Id.* In response, Murphy disputes that he has failed to cooperate, and contends that Federal cannot meet the standard for breach of such a duty in Pennsylvania. Pl.'s Mem. at 8-12.

In Pennsylvania, a breach of an insured's duty to cooperate with an insurance investigation may relieve the insurer from liability if the failure is substantial and has caused the insurer to suffer prejudice. *See Forest City Grant Liberty Assoc. v. Genro II, Inc.*, 652 A.2d 948, 951 (Pa. Super. 1995) In such cases, the insurer bears the burden of showing that prejudice has resulted from an insured's failure to cooperate. *Champion v. Chandler*, No. 96-7263, 1999 U.S. Dist. LEXIS 15824, at *5-6 (E.D. Pa. September 29, 1999). An insurer meets that burden, as a matter of law, if it proves that the insured's failure to cooperate prevented it from participating meaningfully in legal proceedings that may result in payment of the claim at issue. *Id.* As discussed above, it is clear to this Court that the Examination Provision creates a duty to cooperate. Therefore, the only issue for this Court is whether Murphy's failure to cooperate caused Federal substantial prejudice.

The Court finds that Murphy's refusal to cooperate during the investigation has caused substantial prejudice to Federal. As a result of Murphy's actions, Federal was unable to depose three potential witness to the alleged damages of the Property-Murphy's wife and sons. As a consequence, Federal will not be able to refute many of the assertions that Murphy would seek to offer at trial. Not only is Federal de-

prived of their testimony, but Federal would be deprived of all of the potentially relevant evidence that the deposition testimony might uncover. Much of this evidence relates to the very claims at dispute in this dispute, the condition of the property before and after the weather event. Murphy's failure to comply with both his duty to cooperate and the orders of this Court amount to nothing more than an attempt to hinder Federal's investigation and defense of this case-an action that Murphy himself filed.

Incredibly, Murphy disagrees, reasoning that he has not substantially prejudiced Federal. In support of his position, Murphy references a number of cases dealing with an insured's duty to cooperate in Pennsylvania. While Murphy cites the correct legal standard, he does not adequately explain how the facts of these cases support *his* position. In *Ania v. Allstate Ins. Co*, 168 F. Supp. 2d 424, 428 (E. D. Pa. 2001), this Court refused to hold that a failure to appear for an examination under oath was *per se* prejudicial because the insurer in that case did not articulate what specific information it sought and was denied by virtue of the Defendant's failure to submit to an examination under oath. That is not the case here. As outlined above, Federal has shown that it was denied the opportunity to depose eyewitnesses to the alleged damages to the Property and that without that testimony it would be prejudiced at trial. In *Champion*, Judge Pollak granted summary judgment for the insurer because "it was denied an adequate opportunity to take control of a case for which it [was] being asked to be accountable." Similarly, Murphy's actions have forced Federal to defend this action without the benefit full discovery. Murphy cannot have it

both ways; he cannot bring an action for breach and fail to cooperate with its progression. As a result of Murphy's disregard for his duty to cooperate, Federal's Motion for Summary Judgment is granted.

B. Murphy's Motion for Partial Summary Judgment

Despite Murphy's disregard for the proceedings of this Court, he still managed to file his own motion for summary judgment. The Court will give more attention to his Motion that Murphy did to the Court's discovery orders. Murphy argues that the Federal Policy "obligates [Federal] to indemnify [him] for all physical losses sustained regardless of the risk or cause' and that Federal has not fully paid for the damages to the Property because it has not been able to confirm the cause of the damages. Pl.'s Mem. at 20. Murphy reasons that there is "absolutely nothing in the policy requiring [Federal] confirm the peril or cause of the physical losses." *Id.* Murphy concludes that there is no issue of material fact regarding Federal's obligations, therefore entitling him to summary judgment. Murphy is mistaken for numerous reasons.

First, as outlined above, Federal's duty under the Federal Policy is not triggered, as a matter of law, because Murphy has breached his duty to cooperate. Secondly, the record indicates that many issues of fact exist with respect to which of Murphy's alleged claims are actually covered under the Federal Policy. The factual issues include the tree that allegedly was removed from the Property, alleged interior and exterior damage to the Property. Thirdly, a review of the Federal Policy indicates that it does not cover all physical losses re-

gardless of risk or cause Murphy advocates. Lastly, Murphy has not meet his summary judgment burden on the issue of whether the Federal Policy requires Federal to confirm the physical damages to the Property. Murphy has offered no evidence to support this conclusory position. Moreover, Murphy's interpretation would frustrate the plain meaning of the Federal Policy, as it would force Federal to indemnify Murphy for unsubstantiated claims. Murphy's Motion for Summary Judgment is denied.

IV. CONCLUSION

For the reasons set forth above, the Court will grant Defendant's Motion for Summary Judgment and Deny Plaintiff' Motion for Summary Judgment. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 02-2541
	:	
FEDERAL INSURANCE COMPANY,	:	
Defendant.		

Tucker, J. January 18, 2006

ORDER

AND NOW, on this 18th day of January, 2006, upon consideration of Defendant's Motion for Summary Judgment or in the Alternative Dismissal Under FED. R. CIV. P. 37 (Doc 36), Plaintiff's Response in Opposition and Memorandum in Support of Its Motion for Summary Judgment (Doc. 39), and Defendant's Response to Plaintiff's Motion for Summary Judgment (Doc. 40), **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

/S/ PETRESE B. TUCKER

Hon. Petrese B. Tucker, U.S.D.J.

APPENDIX E – ORDER, DATED FEBRUARY 25, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 02-2541
	:	
FEDERAL INSURANCE COMPANY,	:	
Defendant.		

ORDER

AND NOW, on this 25th day of February, 2005, upon consideration of Defendant's Motion to Compel the Deposition of Kathleen Murphy (Doc. 18) and Plaintiff's Motion for a Protective Order (Doc. 19), **IT IS HEREBY ORDERED** that Defendant's motion is **GRANTED. IT IS FURTHER ORDERED,** that Plaintiff's motion is **DENIED.**

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker

APPENDIX F – ORDER, DATED FEBRUARY 25, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 02-2541
	:	
FEDERAL INSURANCE COMPANY,	:	
Defendant.		

ORDER

AND NOW, on this 25th day of February, 2005, upon consideration of Defendant's Motion to Compel Discovery (Doc. 23) and Plaintiff's Response in Opposition (Doc. 27), **IT IS HEREBY ORDERED** that Defendant's motion is **GRANTED.**

IT IS FURTHER ORDERED that:

1. Plaintiff shall, within thirty (30) days of the date of this order, permit Defendant, and Defendant's expert witnesses to view, inspect, measure, photograph and/or videotape all of the property allegedly damaged in the subject loss all adjacent portions of the premises at 7 Coopertown Road, Haverford Pennsylvania that the expert witnesses believe will help them evaluate the cause of the alleged losses, and to do so

at a time convenient to the Plaintiff, Defendant and Defendant's expert witnesses.

2. Plaintiff shall, with fifteen (15) days of this order, arrange for his sons to appear for their depositions at the offices of Defendant's counsel in Berwyn, Pennsylvania, at a time convenient to both the Plaintiff and Defendant's counsel.

3. Joseph Mingioni shall, within thirty (30) days of this order, appear at the offices of Defendant's counsel in Berwyn, Pennsylvania, at a time convenient to both Mr. Mingioni and Defendant's counsel.

BY THE COURT:

/S/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

APPENDIX G –UNITED STATES CONSTITUTION, ARTICLE III

ARTICLE. III.

Section. 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;- to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - *between a State and Citizens of another State* [Modified by Amendment XI]; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

APPENDIX H – UNITED STATES CONSTITUTION, AMENDMENT V

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subjected for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness, against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX I – UNITED STATES CONSTITUTION, AMENDMENT VII

AMENDMENT VII

[Civil rights in civil suits.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

APPENDIX J – FEDERAL RULES OF EVIDENCE, ARTICLE V. PRIVLEGES RULE 501

Federal Rules Evid 501

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

APPENDIX K – FEDERAL RULES OF CIVIL PROCEDURE V. DEPOSITIONS AND DISCOVER RULE 26

Federal Rules Civ Proc 26

Rule 26. General Provision Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) *Initial Disclosure.* Except in categories of proceedings specified in Rule 26 (a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to proceedings in other courts; and

(ix) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26 (f) discovery plan. In ruling on the objection, the court must determine what disclosures – if any—are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not make its disclosures.

(2) *Disclosure of Expert Testimony*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 203, or 705 of the Federal Rules of Evidence.

(B) Except as other wise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evi-

dence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) *Pretrial Disclosures.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 4 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32 (a) of the deposition designated by another party under Rule 26 (a) (3) (B), and (ii)

any objection, together with the grounds therefore, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rule of Evidence, are waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rules 26 (a)(1) through (3) must be made in writing, signed, and served.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45 (a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the dis-

covery of admissible evidence. All discovery is subject to the limitation imposed by Rule 26 (b)(2) (i), (ii), (iii).

(2) *Limitations.*

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 16 (b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its

likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26 (c).

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the

award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is

(A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time to discovery obtained under subdivision (b)(4)(B) of this rule that court shall require the party seeking discovery to pay the other party a fair portion of the

fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial-Preparation Materials.*

(a) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or

attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37 (a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule (a) (1) (E), or when authorized under these rules or by order or agreement of the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosure under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective

information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26 (a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26 (a), including a

statement as when disclosures under Rule 26 (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial preparation material, including –if the parties agree on a procedure to assert such claims after production— whether to ask the court to include their agreement in an order;

(5) what changes should be make in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court

may be local rule (i) require that the conference between the parties occur fewer that 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosure, Discovery Requests, Response, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objections made by a party representation by an attorney shall be signed by at least one attorney of record in attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

APPENDIX L – FEDERAL RULES OF CIVIL PROCEDURE V. DEPOSITIONS AND DISCOVERY RULE 30

Fed. Rules Civ Proc 30

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken; When Leave Required.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles state in rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is

expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if know, and, if the name is not know, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) The party taking the deposition shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at the party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that included (A) the officer's name and business address; (B) the date, time and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation of to the deponent; and (E) an identification of all persons present. If the deposition is recorded other that stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name the deponent a public or private corporation or a partnership governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so names shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth,

for each person designated, the matter on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters know or reasonably available to organization. The subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7)The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b) (2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall pro-

ceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or present a motion under Rule 30(d)(4).

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination

is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order may order the officer conducting the examination to cease forthwith from taking the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) Certification and Delivery by Officer; Exhibits; Copies.

(1) The officer must certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate must be in writing and accompany the record of the deposition.

Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope or package indorsed with the title of the action and marked "deposition of [here insert name of witness]" and must promptly send it to the attorney who arranged for the transcript or recording, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness must, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefore, the office shall furnish a copy of the transcript of other recording of the deposition to any party or the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

APPENDIX M – FEDERAL RULES OF CIVIL PROCEDURE V. DEPOSITIONS AND DISCOVERY

Fed Rules Civ Proc 37

Rule 37. Failure to Make Disclosure or Cooperate in Discover; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) *Appropriate Court.* An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26 (a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted

under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond the inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) *Expenses and Sanctions.*

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court find the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the oppos-

ing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26 (c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relations to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of

this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the actions is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introduction designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B) and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses in-

curred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Insepction. If a party or an officer, director, or managing agent of a party or a person designated under Rule #0(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take an action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that he movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that

the failure was substantially justified or that other circumstance make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information systems.

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

APPENDIX N – FEDERAL RULES OF CIVIL PROCEDURE

VI. TRIALS

Fed Rule Civ Proc 45

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents electronically stored information or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of the subdivisions (c) and (d0 of this rule. A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a trial or hearing, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's

attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not to be tendered. Prior notice of any commanded production of documents and the things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefore, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney' fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling or designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to

produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is

sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26 (b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claims shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify and party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(c) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed

a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

APPENDIX O – 28 U.S.C.S. § 1821

28 § USCS § 1821

§ 1821. Per diem and mileage generally; subsistence

(a) (1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate [United States Magistrate Judge], or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title [28 USCS § 451], any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c) (1) A witness who travel by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common

carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distance adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title [28 USCS § 1920].

(d) (1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702 (c) (B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want to security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212 (d) (5) of the Immigration and Nationality Act (8 U.S.C. 1182 (d) (5), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. 1252 (b) [1229a]) to be deportable, shall be ineligible to receive the fees or allowance provided by this section.

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provision of section 3144 of title 18 apply) may not receive fees or allowances under this section, regardless of whether such a witness is incarcerated at the time he or she makes a claim for fees or allowance under this section.

APPENDIX P – PA CONSTITUTION Art. 1 §1

DECLARATION OF RIGHTS Art. 1 §1

PREAMBLE

WE the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessing of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution.

ARTICLE I

DECLARATION OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT –

Sec. 1. Inherent rights of mankind.

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Sec. 11. Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against

the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

APPENDIX Q – 42 PA.C.S. § 5924 (2006)

§ 5924. Spouses as witnesses against each other

(a) GENERAL RULE. - - In civil matter neither husband nor wife shall be competent or permitted to testify against each other.

(b) EXCEPTION. - - Subsection (a) shall not apply in an action or proceeding:

(1) For divorce, including ancillary proceedings for the partition or division of property.

(2) For support or relating to the protection or recovery of marital or separate property.

(3) For custody or care of children, including actions or proceedings relating to visitation rights and similar matters.

(4) Arising under 23 Pa.C.S. Ch. 61 (relating to protection from abuse).

(5) When a statute heretofore or hereafter enacted applicable to the action or proceedings provides either expressly or by necessary implication that spouses may testify therein against each other.

APPENDIX R – 42 PA.C.S. § 5923 (2006)

§ 5923. Confidential communications between spouses

Except as otherwise provided in this subchapter, in a civil matter neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial.

APPENDIX S – 40 P.S. § 752 (2006)

§ 752. Conditions subject to which policies are to be issued

(A) No such policy shall be delivered or issued for delivery to any person in this Commonwealth unless:

(1) the entire money and other considerations therefore are expressed therein; and

(2) the time at which the insurance takes effect and terminates is expressed therein; and

(3) it purports to insure only one person, expect that a policy may insure, originally or by subsequent amendment, upon the application of an adult head of a family who shall be deemed the policyholder, any two or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed nineteen years and any other person dependent upon the policyholder; and

* * *

APPENDIX T- **EXCERPTS DEPOSITION OF ANGELA BAKER MULVEY, DATED DECMEBER 1, 2004**

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY Plaintiff,	:	CIVIL ACTION
v.	:	NO. 02-2541
FEDERAL INSURANCE COMPANY, Defendant.	:	

DEPOSITION OF
ANGELA BAKER MULVEY
December 1, 2004

Okay. Now, this is all purportedly from page ten at the bottom to the bottom of page 11, entered by you on 10/4/2000; is that correct?

A. Yes

Q. Now, it says discuss findings with rep. Is that representative or what is that?

A. Supervisor

Q. And who is that?

A. At the time the technical supervisor would have been Joe Smith.

Q. Did you discuss it with him?

A. Yes. I sent him a note.

Q. That is what, page 12 allegedly?

A. Yes, page 12.

Q. Okay. Now, back on page 11 it indicates no subrogation, no salvage. The coverage was confirmed as yes. There were some P-I-L-O-R done, not applicable?

A. That's right.

Q. And plan of action. Is that all correct?

A. Yes.

Q. Anything else?

A. Not really.

Q. Has there been any written record of any kind, including specifically in these computer logs, denying or declining to pay the losses or damages, including the additional losses or damages due to the hurricane, which is the subject of this case?

A. No, I don't believe we ever denied your claim.

Q. That would include to the pool, the pool fence, the pool area, concrete, the basement bedrooms and the bedroom that you characterized as my son's bedroom; is that correct?

A. Yes.

Q. Who has the final authority to determine whether or not to pay or not pay a claim, including specifically a property damage claim at Chubb?

A. Final authority?

Q. Yes.

A. I honestly don't know.

Q. Well, let's try it this way.

APPENDIX U – CHUBB/FEDERAL INSURANCE COMPANY'S CONFIRMING LOSS CAUSED BY HURRICANE

ESTIMATE WRITTEN? NO
RESERVE & FEATURES: BUILDING DEMO CONTENTS ALE

SUBROGATION: No subro available as loss caused by hurricane

SALVAGE: NO

PRIORS CHECKED: Yes

COVERAGE CONFIRMED: Yes

FILE DONE: N/A

PLAN OF ACTION: Discuss findings with rep.

APPENDIX V – LETTER DATED MARCH 5, 2005

Robert J. Murphy
COUNSELOR AT LAW AND PROCTOR IN ADMIRALTY
2341 PENNSYLVANIA AVIENUE
PHILADELPHIA, PA 19130

Via Fax

March 5, 2005

By Appointment
Haverford Office
7 Coopertown Road
Haverford, PA 19041

Michael J. Plevyak, Esquire
White and Williams
One Westlakes
1235 Lestlakes Drive, Suite 310
Berwyn, PA 19312-2416

RE: Robert J. Murphy v. Federal Insurance Company
U.S.D.C for the E.D. of PA 02-CV-2541

Dear Mr. Plevyak:

In response to your letter dated March 4, 2005 received today be advised as follows. We of course regret any transmission errors regarding our letter dated March 3, 2005 as referenced in your letter. As you are aware due to my secretary's recent sudden illness more than the normal errors may occur due to inexperience and/or equipment malfunctions, etc. In any event, we are enclosing an additional complete copy of our letter dated March 3, 2005 reiterating the response from my sons that they will not proper service of a

subpoena in accordance with applicable federal rules of civil procedure which you have admittedly ignored. Moreover, as you are aware, my son, Joe, as been living outside of this Court's jurisdiction over the last six years and is not subject to service of subpoena in accordance with applicable federal rules and will not voluntarily appear and subject himself to your deposition or the Court's jurisdiction with concomitant legal burdens involving a matter in which he is not a party witness or insured, inter alia, and has no obligation to appear for a deposition simply because you wish him to do so. Furthermore, it is equally obvious we have no authority or capacity or obligation to compel these individuals to voluntarily appear at your office for a deposition and subject themselves to these proceedings or the Court's jurisdiction in the absence of a valid service of subpoena in accordance with federal rules. Accordingly, under the circumstances, your attempt to notice their depositions for March 11, 2004 without complying with the Rules of Civil Procedure, including valid personal service of a subpoena to which we object and request the same be stricken and/or cancelled since it serves no purpose in their absence.

Please immediately advise so that it will not be necessary for us to appear and restate the foregoing. We also request that you desist from sending self-serving declarations and/or assumptions regarding non-existing agreements between us including in particular scheduling agreements. Our silence or failure to respond all of your self-serving assumptions do not constitute any agreements whatsoever. On the contrary, if you wish to agree on any subject please call the under-

signed and discuss it in an attempt to reach an agreement; otherwise there is no agreement.

With regard to the inspection of the premises we will tentatively remain available on March 11 in addition to March 17 and 18, 2005 after 1:00 p.m.; however, we must have your response on or before Tuesday, March 8, 2005 due to other extensive matters. Although we sympathize with scheduling difficulties we have already rearranged our schedule to provide these dates. Furthermore, we request you identify these unspecified individuals including experts who will appear and a summary of your inspection protocol so that we will be prepared to accommodate you.

Very truly yours,

Robert J. Murphy

APPENDIX W – LETTER DATED DECEMBER 30, 2005

White and Williams, LLP
Westlakes
Westlakes Drive, Suite 310
Berwyn, PA 19312-2416
Phone: 610.251.0466
Fax: 610.296.4628

Michael J. Plevyak
Direct Dial: 610.240.4707
Direct Fax: 60.240.4937
plevyakm@whiteandwilliams.com

December 30, 2005

Robert J. Murphy, Esquire
2341 Pennsylvania Avenue
Philadelphia, PA 19130

RE: Robert J. Murphy v. Federal Insurance Company
U.S.D.C for the E.D. of PA 02-CV-2541

Dear Mr. Murphy:

Enclosed please find a copy of Defendant's Response to Plaintiff's Motion in Limine To Preclude Testimony, Reports and Opinion of Messrs. Davis and Honig, with accompanying brief in opposition thereto, which was filed electronically with the court this date.

Very truly yours,

WHITE AND WILLIAMS LLP

By:

MJP:jbd

Michael J. Plevyak

APPENDIX X – DEFENDANT'S RESPONSES TO PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE TESTIMONY, REPORTS AND OPINIONS OF MESSERS. DAVIS AND HONIG,

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY Plaintiff,	:	CIVIL ACTION
v.	:	NO. 02-2541
FEDERAL INSURANCE COMPANY, Defendant.	:	

DEFENDANT'S RESPONSES TO PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE TESTIMONY, REPORTS AND OPINIONS OF MESSRS. DAVIS AND HONIG

1 through 4. Admitted in part; denied in part. It is admitted only that the documents attached as Exhibits A through C of plaintiff's motion are true and correct copies of the reports and curricula vitae of the respective witness, although the report and C.V. attached as Exhibit B are jumbled. For the reasons set forth at greater length in the attached Brief, it is denied that the reports and opinions of defendant's expert witnesses, Franklin M. Davis, Jr., B.S.E., and Daniel M. Honig, P.E. are unqualified, unreliable, irrelevant, immaterial, confusing, mutually exclusive, speculative, prejudicial,

will not assist the trier of fact to resolve any disputed issue, are without the requisite degree of reasonable engineering certainty, or are otherwise inadmissible for any of the reasons alleged by plaintiff.

WHITE AND WILLIAMS LLP

By: _____
Michael J. Plevyak
Attorneys for Defendant,
Federal Insurance Company

water from the hurricane, the buoyant uplift force caused the pool shell to float rather than rest on its bed of stone." Mullin Report, p.2.[9]

(3) In his May 27, 2005 report, defendant's engineering expert witness, Daniel M. Honig, P.E., stated, in pertinent part, "when the pool is emptied, upward movement or 'floating' is caused by the combination of the pool's buoyancy and the weight relative to the high water table." Honig Report, p.2.

(4) In his very recent December 13, 2005 report, plaintiff's engineer, Richard E. Daniels, P.E., states, in pertinent part, "The record hurricane rainwater filled a cavity around the pool shell and caused the pool to become buoyant." Daniels Report, p.3.

Although the engineers used different words to describe the water, all of them agreed the plaintiff's 40-year-old swimming pool was caused to "float" by water resulting from the hurricane. It matters not whether such water is described as a flood, surface water, ground water, or pressure of the water, because damage caused by any of those things is excluded from coverage under the pertinent insurance policy.

If any lack of reliability is evident from the reports themselves, it results from the direct inconsistent conclusions of plaintiff's own engineers regarding whether the pool could

---

[9] A copy of Mr. Mullin's report, which was conspicuously absent from plaintiff's motion is attached hereto as Exhibit. "1."

settle back into its original position after having been "floated." The first engineering hired by plaintiff, Joseph V. Mullin, opined that a tree was involved because otherwise the floating pool shell could have settled back into its original position. Mr. Mullin stated, in pertinent part, the following "It should be noted that when a shell floats it can remain level and settle back into its original position when the water recedes back through the stone bed." Mullin Report, p.2. Defendant's.

APPENDIX Y – NOTICE OF VIDEOTAPE DEPOSITIONS, DATED MARCH 11, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY Plaintiff,	:	CIVIL ACTION
v.	:	NO. 02-2541
FEDERAL INSURANCE COMPANY, Defendant.	:	

NOTICE OF VIDEOTAPE DEPOSITIONS

TO: Robert Murphy, Esquire

PLEASE TAKE NOTICE that on Friday, March 11, 2004, the undersigned will take the depositions of Robert Murphy (son of the plaintiff in this action), commencing at 11:00 a.m., and Joseph Murphy (the other son of plaintiff in this action), commencing at 1:00 p.m. or immediately following the deposition of Robert Murphy (son of plaintiff), whichever is later, at the law office of White and Williams LLP, One Westlakes, Suite 310, 1235 Westlakes Drive, Berwyn, PA 19312, upon oral examination before a duly authorized notary public or some other officer authorized by law to administer oaths. The examination will be videotaped and

conducted in accordance with the Federal Rules of Civil Procedure and will continue day to day until completed.

WHITE AND WILLIAMS LLP

By: _____

MICHAEL J. PLEVYAK
Identification No.: 25418
1500 Lancaster Avenue, Suite 206
Paoli, PA 19301
(610) 251-0466
Attorneys for Defendant,
Federal Insurance Company

cc: Karasch & Associates

APPENDIX Z – NOTICE OF VIDEOTAPE DEPOSITIONS, DATED MARCH 18, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY Plaintiff,	:	CIVIL ACTION
v.	:	NO. 02-2541
FEDERAL INSURANCE COMPANY, Defendant.	:	

NOTICE OF VIDEOTAPE DEPOSITIONS

TO: Robert Murphy, Esquire

PLEASE TAKE NOTICE that on, March 18, 2005, commencing at 1:30 p.m., the undersigned will take the deposition of Kathleen Murphy, at the offices of White and Williams LLP, One Westlakes, Suite 310, 1235 Westlakes Drive, Berwyn, PA 19312, upon oral examination before a duly authorized notary public or some other officer authorized by law to administer oaths. The examination will be videotaped and conducted in accordance with the Federal Rules of Civil Procedure and will continue day to day until completed.

WHITE AND WILLIAMS LLP

By: _____

Dated:_____

MICHAEL J. PLEVYAK
Identification No.: 25418
1500 Lancaster Avenue, Suite 206
Paoli, PA 19301
(610) 251-0466
Attorneys for Defendant,
Federal Insurance Company

cc: Karasch & Associates

APPENDIX AA - **EXCERPTS** TRIAL DEPOSITION, DATED JANUARY 12, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA

ROBERT J. MURPHY Plaintiff,	:	CIVIL ACTION
v.	:	NO. 02-2541
FEDERAL INSURANCE COMPANY, Defendant.	:	

TRIAL DEPOSITION of JOSEPH MINGIONI, taken before June Wright, Shorthand Reporter and Notary Public, at the offices of Mingioni Construction, 5081 West Chester Pike, Edgemont, Pennsylvania, on Thursday, January 12, 2006, commencing at 3 p.m.

KARASCH & ASSOCIATES
REGISTERED PROFESSIONAL REPORTERS
PENNSYLVANIA AND DELAWARE
(800) 621-5689

APPEARANCES:

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(215) 567-5300
Counsel for Plaintiff

WHITE AND WILLIAMS, LLP
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Counsel for Defendant

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PROCEEDINGS

.....JOSEPH MINGIONI, was called as a witness, and after having been duly sworn, according to the law, was examined and testified as follows:

-EXAMINATION-

MR. MURPHY: For the record – and I guess I will have the reporter's Notice of Deposition of this trial deposition marked as an exhibit.

We are here for a trial deposition at this date, time, and place – I think it's January 12th at 3 p.m. in Mr. Mingioni's office – because Mr. Mingioni will not be in the country as of the scheduled trial date on January the 23rd of this year. And, accordingly, we are taking his trial deposition.

I'll ask the witness – and Mr. Mingioni, do you agree to waive signing, sealing, reading, and reviewing and certification of the deposition so that it can be used by me in the upcoming trial?

THE WITNESS: Yes.

MR. PLEVYAK: Mr. Mingioni may agree, but I don't agree.

MR. MURPHY: Obviously, I wouldn't expect you to. The defendant has – I don't know whether it's filed or – sent to Court a letter essentially requesting the trial be continued.

We've sent a response. We originally scheduled this trial deposition for Monday. However, due to the belated

request for the continuance, Mr. Mingioni was kind enough to postpone it to today's date, time, and place in the event the Court had the opportunity to rule on it.

However, my last contact with the Court's clerk as of today shortly before this deposition was essentially to proceed as though the trial was not going to be scheduled or to proceed at our peril.

So, accordingly, we are proceeding as scheduled in accordance with Court's prior order. Obviously, if you have any statement to make, Mr. Plevyak, go right ahead.

MR. PLEVYAK: No.

MR. MURPHY: Very good.

BY MR. MURPHY

Mr. Mingioni –

MR. PLEVYAK: Other than I wanted to just point out that the request wasn't belated, but – that's the request for a continuance.

MR. MURPHY: The request, as I understand, was last Thursday or Friday by letter, is that correct? The letter speaks for itself.

MR. PLEVYAK: Yeah. I mean we can disagree on the timing. You just characterized the request. I wanted to respond to that.

MR. MURPHY: Very good.

BY MR. MURPHY

Q. Now, Mr. Mingioni, would you state your name and address – you can put your business address – for the record, please.

A. My name is Joseph Mingioni. We are located at 5081 West Chester Pike, Edgemont, Pennsylvania.

Q. And we are here today to take your trial deposition in your office at this address; is that correct?

A. Yes.

Q. Now, the trial, as I indicated, is scheduled on January 23rd of this year.

Will you be in this country or available for that date, or will you be unavailable and out of the country?

A. I will be unavailable and out of the country.

Q. And essentially without getting into the details, where will you be?

A. I'll be in South America.

Q. Okay. That's unavailable.

Now, Mr. Mingioni, generally, you are in what business?

A. I'm a general contractor.

Q. And how long – go ahead.

A. Okay.

Q. How long have you been a general contractor.

A. Approximately 20 years.

Q. And what do you do generally as a general contractor? What's that entail?

A. We oversee numerous types of projects being anywhere from building a complete new home to major, what we call, renovations being that – you know, putting in new foundations, excavating that is, right up to the roof line. And that entails every and all finishes in between.

Q. As a result of that, do you ordinarily and regularly examine either blueprints or otherwise to prepare estimates to build the house, make repairs, do renovations form soup to nuts?

A. I'd say about 70 percent of the projects that we do are architecturally driven. So, therefore, they are – they have architectural drawings.

Q. And that includes anything from building a house or houses on a project to repairing or renovating, I guess, parts or portion thereof?

A. Yes, that's correct.

Q. As well as any outside structures.

A. Meaning –

Q. Well, garages, roofs.

A. Additions.

Q. Anything.

A. Yes.

Q. Thank you. Let's see.

Now, sometime ago and at my request, did I ask your firm to, I guess, bid on a proposal to enclose or add an addition to my residence at 7 Coopertown Road back in we'll say, the summer of 1999?

A. Yes, you did. You happened to stop by a project that our company was working on.

Q. Okay. And as a result of that – first of all, did you prepare a bid and a proposal?

A. Yes.

Q. Okay. And now – and I realize this is sometime ago. But as a result of that, did you have occasion to examine or walk around the property so that you could prepare various proposals and estimates to perform this project to add an addition to the property?

A. Yes.

Q. Okay. And in doing that, for example, did you have occasion to walk around the area of the garage at the premises of 7 Coopertown Road in the summer of 1999?

A. No.

Q. Now, did you also have occasion to walk around the pool area, which is adjacent to the house at 7 Coopertown Road, for a variety of reasons to bid this proposal?

A. Yes.

Q. And did you observe any damage of any kind whatsoever to the area of the pool in the summer of 1999?

A. No.

Q. Now, did you eventually provide me with a bid and a proposal to perform this addition at the property at Coopertown Road?

A. Yes I did.

Q. And eventually I accepted it and asked you to go ahead.

A. That's correct.

Q. Now, let my ask you this first for a moment. Would you describe, I guess, the grade or the topography of this property or specifically the house and the pool area sitting on a hill? Can you just describe that as well as you can?

A. The current residence sits basically on what I would consider the center of the property. Although, I'm not sure if it is the center or not.

Q. And it sits relatively high with regards to the remainder of the property so that any – you know, it's high. It's higher than…

A. So would it be fair to say that the property sitting on this hill in the middle – does the grade in all directions lead away from the house and the pool?

MR. PLEVYAK: Objection. Leading.

BY MR. MURPHY:

Q. Where does the grade lead in relation to the house and the pool in all directions around this property?

A. It leads away from the home.

Q. The project that you did the work hereon was approximately started when?

A. Ninety-nine, October. The last week or the beginning of November, either one of those two.

Q. Of 1999.

A. That's correct.

Q. Now, at the time at my request, did you – were you asked to examine various areas of the property to prepare an estimate for damages that had just been done following a hurricane?

A. Yes.

Q. Okay. And let's take – and did you prepare those estimates?

A. Yes, I did.

Q. And are those fair, reasonable, and necessary estimates to perform the work described in those estimates for the damages done following the hurricane?

A. Yes.

Q. And I'm going to have them marked in a minute. Let's try it this way.

A. Did you – when you examined the property back somewhere around November of 1999 – let's take the area of the pool.

Q. Would you, as well as you can, describe generally what damages you saw resulting from this hurricane?

A. My observation once we walked around to the pool area was of several things. The pool appeared to be lopsided, one side raised.

Q. Okay. For a moment when you say "lopsided, one side raised, "raised above what if you would?

A. Above the concrete walk.

Q. Okay. And did you – did you ever actually measure it, or did you just look at it?

A. I just looked at it.

Q. Could you generally estimate how many inches above it, it was without guessing?

A. No, because I didn't measure it.

Q. What happens to the wood or what can happen?

A. The wood can get to the point where it's not as functional as it was when it was first put in there.

And my recommendation, as I say here, would be to sister those joists to make sure that the water damage to them would not –

Q. Turn into wood rot or what?

A. Wood rot and –

MR. PLEVYAK: Objection to the leading form.

BY MR. MURPHY:

Q. Let me ask you –

A. The damage to the bottom of the wood would weaken the joists.

Q. And in your experience, when wood has become soaked like this, does it – does it deform or deteriorate –

A. It can deteriorate -

MR. PLEVYAK: Objection.

THE WITNESS: - to the point that the strength is out of it.

MR. PLEVYAK: Leading

BY MR. MURPHY:

Q. And having examined it and in accordance with your years of being a general contractor doing this kind of work that you've indicated, was it your proposal and recommendation that this work be done in order to protect and to make sure that the crawl space and the floor above it remained sound and functional?

A. That's correct

Q. Now, all of these proposals –

(telephone ringing)

MR. MURPHY: Do you have to get that?

THE WITNESS: No let it go.

BY MR. MURPHY:

Q. All of these proposals, I guess it's Mr. Mingioni-1 through -5, which you've identified, are these fair, reasonable, and necessary estimates for work to be – oh, wait a minute. Strike that for a moment. I forgot – where was I?

MR. MURPHY: Off the record.

(Discussion off the record)

MR. PLEYVAK: I'm going to object on the grounds of relevancy, but go head.

MR. MURPHY: And we've had a discussion off the record, possible confusion. Mr. Pleyvak will retain his objection to the relevancy of Exhibit 4.

And I'm going to expedite it particularly since it's – I think it's apparently been paid. But at any rate, I'll shorthand it as follows.

BY MR. MURPHY:

Q. Mr. Mingioni, I'm going to again show you Exhibit 4, which is your estimate to do the repair work to the garage roof as a result of the hurricane as fair, reasonable, and necessary in the amount of $3500 as damage from the hurricane; is that correct?

A. Yes, it is.

MR. MURPHY: The – let me just cover – this is off the record.

(Discussion off the record)

MR. MURPHY: Let's go back on the record here for a moment.

BY MR. MURPHY:

Q. Mr. Mingioni, during the course of this matter, did there come a time when a representative of the defendant contacted you regarding these proposals, Mingioni-1 through -5?

A. Yes, as I recall.

Q. And essentially did he call you on the phone, ask you what you did?

A. Yes. He called me at this office, and he wanted to discuss –

Q. What you did.

A. - what I did, what we did as a company. And I told him –

Q. And what the proposals meant.

MR. PLEVYAK: Objection to the leading form of it.

MR. MURPHY: All right. Sure.

BY MR. MURPHY:

Q. What did he discuss with you?

A. We discussed the following: We discussed my proposals, number one, and what needed to be done and how much of the work we had performed.

And at that point in time, we had only performed taking off the old roof and putting a new roof on.

Q. And did you tell him that the only thing at that point in time that you had done due to the hurricane damage was the roof? Is that correct?

A. That's correct.

MR. PLEVYAK: Objection to the leading form.

MR. MURPHY: All right.

BY MR. MURPHY:

Q. When you had this discussion with him with regard to the work that you had actually done versus the estimates, what did that involve: the roof?

A. The roof – well, we –

Q. Strike that. I don't want – I certainly don't want to be leading. Let's try it this way.

You had a discussion with him regarding these four or five proposals as to what you had done versus what you had done as a result of the hurricane.

A. That's correct.

Q. And so you told him what with regard to these proposals that you had done and what you hadn't done; is that correct?

A. That's correct.

Q. And did he ask you and did you tell him whether these damages were due to the hurricane?

A. I told them they were.

MR. PLEVYAK: Object to the leading.

THE WITNESS: They were from the hurricane.

BY MR. MURPHY:

Q. Let me ask you. What did you tell him?

A. I told him that I observed water damage down in the basement, in the crawl space.

The roof outside on the garage, we observed broken shingles, raised shingles. And it was obviously -

Q. How about the pool and the fence?

A. I'll get to that.

MR. PLEVYAK: Object to the leading form again.

MR. MURPHY: Well, no, go ahead. Answer the question.

THE WITNEES: Okay, Garage – what I observed, what we saw, and why we wanted to redo the roof. And then we got into the pool area.

I told him I observed that the pool itself appeared to have been raised on one side and lowered on the other.

Some of the concrete walkway, as I call it or – was raised in sections. And others were at the same level that they had been.

And it appeared that the – a tree had fallen across the pool and, you know

BY MR. MURPHY:

Q. How about the fence?

A. - from the hurricane.

The fence. I told him about the fence, that a lot of these slats were down.

Q. And so you essentially told him in accordance with the proposals, what you had done, what you hadn't done, what you believed caused it.

A. That's correct.

Q. And what you believed caused it was what? That you told him.

A. I told him I thought the hurricane caused the damage.

Q. All of the damages.

A. All of the damages, yes.

Q. Now, did he say anything else to you that you recall?

A. No, he didn't.

Q. Did he ask you at that point to send you [sic] the proposals again? Or as far as you understood it, was he talking to you with the proposals, if you know?

A. I took it that he had them in his possession. That's the way I took it.

Q. Because what? He discussed with you specific money or sums or just –

A. I cannot recall whether we got into the actual amounts of the proposals.

Q. Okay. Now, the – let me turn now for a moment to the – to that project.

I think you indicated you were there – started in the end of October, beginning of November '99 to do this addition to the house; is that correct?

A. That's correct.

Q. Now – and let's try it this way. The area where you did the addition, was there existing – was there various existing things on this porch?

A. Yes, there was. There was a wall about 24 inches deep that came out three sides, which had to be removed.

Q. Let's take that for a minute. You say it's a wall that's 24 inches wide.

A. Of stone. A stone wall.

Q. Okay. And did it – can you – I know

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(2)

FILED
JUL 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 06-1679

ROBERT J. MURPHY

Plaintiff/Petitioner

v.

FEDERAL INSURANCE COMPANY

Defendant/Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari of the November 20, 2006 Judgment of the United States Third Circuit Court of Appeals, Nos. 05-1814, 06-1320, 06-1356 (Sloviter, Chagares, and Greenberg)

Michael J. Plevyak, Esquire
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Attorneys for Defendant/Respondent, Federal Insurance Company

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Has Petitioner presented a compelling reason for certiorari to review the award of summary judgment in this first-party property insurance case in favor of the insurer when the policy required Petitioner to cooperate with the insurer's investigation, the Petitioner repeatedly failed to do so, and such a lack of cooperation prejudiced the insurer in the evaluation of the insurance claim?

Suggested answer: No.

2. Is a compelling reason presented for purposes of certiorari when the courts below compelled the deposition of Petitioner's non-party wife when she was a named insured under the policy, had the same duty of cooperation as Petitioner, and was properly subpoenaed?

Suggested answer: No.

3. Should this Court accept certiorari to review the denial of a protective order to Petitioner's wife when she may have possessed relevant information, no marital privilege prevented her from offering her personal observations and knowledge, and she was otherwise fully competent to testify?

Suggested answer: No.

4. Should this Court accept certiorari to review whether summary judgment may be properly awarded for a discovery sanction when the courts below awarded summary judgment due to the Petitioner's failure to cooperate under the insurance policy and not for a discovery sanction?

Suggested answer: No.

LIST OF PARTIES

The Petition does not identify the list of parties. The parties to this proceeding are Plaintiff/Petitioner Robert Murphy and Defendant/Respondent Federal Insurance Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Federal Insurance Company states that it is a wholly owned subsidiary of The Chubb Corporation, which is a publicly traded company on the New York Stock Exchange.

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INTRODUCTION

This matter stems from a garden variety insurance coverage dispute between Plaintiff/Petitioner, Robert Murphy ("Murphy") and Defendant/Respondent, Federal Insurance Company ("Federal"). Murphy alleged that his home in Haverford, Pennsylvania, sustained storm damage in September 1999, and that these damages were covered under the first-party property portion of the insurance policy issued by Federal (the "Federal Policy" or "the Policy").

Despite Murphy's representations to the contrary, he continuously forestalled Federal's attempts to obtain even the most basic information concerning the insurance claim. Murphy refused to comply with conditions precedent to coverage and court orders to provide examinations under oath of his wife, Kathleen Murphy ("Mrs. Murphy" or "his wife"), and other family members who resided in the house during the time of the alleged loss. Due to Murphy's utter failure to cooperate with the investigation of the claim and discovery, Federal moved for summary judgment. On January 18, 2006, the District Court granted Federal's motion and formally entered judgment on January 24, 2006. (A. 22). The Third Circuit affirmed for substantially the same reasons relied upon by the District Court. (A. 6).

Murphy now seeks to invoke this Court's discretionary jurisdiction through the instant Petition for Writ of Certiorari. If this Court has trouble discerning the precise reasons Murphy advances for certiorari, it is not alone. As best Federal can discern, Murphy appears to present four issues. First, [1] the duty of cooperation was not a precondition to coverage under the Policy. See Petition at 12-14. Second, his wife – a named insured under the Policy but not a party to the proceeding – was not properly subpoenaed and the District Court improperly compelled her deposition. See Petition at 7-10, 18-24. Third, Mrs. Murphy's testimony was irrelevant and privileged. See Petition at 15-21. Fourth, Federal was improperly

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[1]Federal has reorganized these points for the sake of clarity and coherence.

awarded summary judgment as a result of a discovery sanction. See Petition at 10-12. In a style long on hyperbole and short on substance, Murphy contends that these alleged errors violated numerous rules of procedure, rules of evidence, the federal constitution, and state substantive law. Murphy is wrong.

The courts' opinions below are well reasoned, yet unremarkable for the basic legal principles they espouse. For example, the courts below held that, when an insured files an insurance claim, he has an obligation to cooperate with the insurer's investigation of the claim. If the insured fails to cooperate with the investigation in a manner which prejudices the insurer's evaluation or defense of the claim, then there is no coverage under the policy.

The courts below also held that a non-party who is properly subpoenaed has an obligation to comply with that subpoena. This is especially true when, in the investigation of an insurance claim, that non-party is a named insured under the policy who may have information relevant to the alleged claim.

The courts below also reasoned that an insured's spouse may offer testimony as to her personal observations and knowledge. An insured cannot file an insurance claim and then use any marital privilege with a co-insured as a shield to prevent the insurer from discovering the facts and circumstances of the alleged loss. To the extent that a marital privilege or spousal incompetency are implicated, then they can be preserved through appropriate objection, but do not afford a basis to ignore discovery altogether.[2]

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[2] The last issue pressed by Murphy – that the courts below improperly awarded judgment as a discovery sanction – is factually incorrect. Although Federal pursued discovery sanctions under Rule 37 of the Federal Rules of Civil Procedure as an additional basis for summary judgment, the courts below relied on the Murphys' non-cooperation with Federal's investigation and not on any discovery sanctions.

Contrary to Murphy's suggestion, these are well-established legal principles of American jurisprudence that are in full accord with the letter and spirit of rules of procedure, rules of evidence, the federal constitution, and state substantive law. Simply, no basis for certiorari exists in law or fact.

COUNTER-STATEMENT OF THE CASE

Although Federal is hesitant to burden this Court with an additional recitation of the case, Federal is duty bound to do so because Murphy's statement of the case contains numerous misstatements and misrepresentations of the facts.

A. THE FEDERAL POLICY

Murphy and his wife purchased, and were named insureds, on a policy of insurance issued by Federal. At the time of the alleged loss in September 1999, the Policy contained standard terms and conditions that defined, among other things, the Murphys' duties to cooperate in the investigation of a loss as well as the nature and scope of the coverage. The pertinent provisions of the Policy are discussed throughout this brief.

B. THE ALLEGED LOSS

Murphy alleged that on September 17, 1999, he sustained physical losses to the property located at 7 Coopertown Road, Haverford, Pennsylvania ("the Property"). Murphy contended that a tree fell and somehow caused physical damage to the Property included damage to cedar fencing, a swimming pool and its surrounding area, a bedroom, the garage roof, and ground floor areas.

C. MURPHY WAITED SIX MONTHS TO PROVIDE NOTICE TO FEDERAL

Murphy did not report the loss to Federal until March 2000 – some six months after it allegedly occurred. Although Murphy contended that he reported the claim earlier, cooperated in Federal's claim investigation, and provided information and inspections as

requested by Federal, he did not file in the District Court any sworn or unsworn declarations to verify those allegations as a matter of record, subject to the penalty of perjury. It is, nonetheless, undisputed that it was not until September 28, 2000 – over one year after the alleged loss – that Federal's representative first had an opportunity to inspect the Property.

When that inspection took place, there was nothing of the tree allegedly involved in the loss to show Federal's representative. Murphy claimed that there was not even a stump because the "tree was blown out of the ground and removed." He also claimed that the wood from the tree that he placed around his property had mysteriously dissolved. In addition, the garage and his sons' bedroom was repaired. Although Murphy is a lawyer, he failed to take any photographs of the alleged damage. He contended that he had three engineers out to look at the swimming pool, but did not have any reports as to their findings, did not know the names of two of them, and did not have any contact information for the third one.

D. FEDERAL ATTEMPTED TO INVESTIGATE THE MYSTERIOUS LOSS, BUT MURPHY FILED SUIT WHILE THE INVESTIGATION WAS ONGOING

Contrary to Murphy's repeated suggestions, Federal never confirmed the loss or accepted coverage under the Policy except for garage roof damage.[3] Instead, Federal attempted to fully investigate

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[3] Murphy attempts to prove the contrary by, among other things, submitting excerpts of the deposition of a Federal witness, Angela Baker Mulvey, along with a document. That material was not a part of the record below and therefore must be disregarded. Fed. R. App. P. 10(a); Branion v. Gramly, 855 F.2d 1256, 1260 (7th Cir. 1988), cert. denied, 490 U.S. 1008 (1989). In any event, the material does not suggest that Federal accepted the rest of Murphy's insurance claim but rather suggests only that Federal never issued a formal denial of the claim.

the facts and circumstances of the alleged loss since the inception of the claim. While Federal was still investigating the substance of Murphy's claims and was awaiting further information and documentation promised by Murphy, he commenced the instant lawsuit and alleged that Federal breached its contractual duties under the policy and committed bad faith.

Federal had requested an inspection of the Property by an engineer, but Murphy filed his lawsuit before he allowed the engineer to inspect the Property. Even then, the engineer was not allowed access to all parts of the Property allegedly damaged in the loss. Murphy's own correspondence confirmed that he was still submitting documentation in support of his claim after he filed his lawsuit and was still promising additional documentation and information.

E. FEDERAL CONTINUED ITS INVESTIGATION OF THE CLAIM THROUGH THE DISCOVERY PROCESS, BUT ITS INVESTIGATION WAS THWARTED BY MURPHY'S REPEATED FAILURES TO COOPERATE

When Murphy eventually filed his Complaint in this lawsuit, this case was removed to federal court. The progress of this case was impeded when Murphy moved to remand, which was denied by the District Court, and then took a premature appeal, which was dismissed by the Third Circuit Court of Appeals.

When the case returned to the District Court, Federal used the discovery process to continue its investigation of Murphy's insurance claim. Murphy impeded discovery, and thus, the further investigation of the claim, by refusing to answer interrogatories and document requests. As a result, Federal moved to compel answers and responses to same. After Murphy belatedly responded to Federal's interrogatories and document requests, Federal attempted to schedule the depositions of Murphy and his wife, which Murphy thwarted through constant re-scheduling, never once stating an

objection to the deposition of his wife or contending that the subpoena served in connection therewith had not been properly served. Several months later, Murphy outright refused to allow the deposition of his wife, which required Federal to file a motion to compel. Murphy and his wife responded with a motion for a protective order.

When Murphy eventually appeared for his deposition on November 17, 2004, Federal had its first opportunity to examine him under oath regarding his contentions concerning the alleged losses. At that time, Murphy contended that the tree that allegedly fell across his pool was 60-80 feet tall and 18 inches in diameter and was removed entirely by himself, without anyone else's knowledge, and before anyone saw it in its fallen state. Murphy also contended that the alleged damage to the interior of his home, including the damage to his sons' bedroom, had been repaired by a person for whom he had absolutely no contact information - no address, phone number, or cell phone number. Federal immediately requested the examinations under oath of the Murphy sons, who were residents of the household and would be expected to have knowledge of the alleged damage to the pool and to their bedroom. Murphy refused to provide the depositions of his sons and confirmed that a motion to compel would be necessary. Thereafter, Federal moved to compel the sons' depositions.

Federal's motions to compel the deposition of Mrs. Murphy and the Murphy sons were granted by the District Court. Federal scheduled those depositions in accordance with the District Court's orders. None of the deponents appeared in accordance with the District Court's orders.

Federal moved for summary judgment, or in the alternative, for dismissal for the failure to comply with discovery orders. The District Court awarded Federal summary judgment due to Murphy's failure to cooperate with Federal's investigation of the claim. The Third Circuit Court of Appeals affirmed. Murphy now seeks to invoke the discretionary jurisdiction of this Court through the instant Petition for Writ of Certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

This Court grants discretionary certiorari only for compelling reasons and only in the rarest of cases. Sup. Ct. R. 10. Such compelling reasons include the presence of a conflicting decision, an important, novel, or unsettled federal question, or a substantial departure from existing law. Sup. Ct. R. 10. This case presents none of them. Instead, this case represents a circuit court's ordinary and correct interpretation of federal law on routine discovery issues and state law on well-established insurance issues.

I. MURPHY'S FAILURE TO COOPERATE WITH FEDERAL'S INVESTIGATION OF THE LOSS RESULTED IN NO COVERAGE UNDER THE POLICY

A. THE POLICY CONTAINED A DUTY OF COOPERATION

Murphy contends that cooperation in the investigation of the loss was not a condition precedent to insurance coverage, but rather only a potential "forfeiture" of coverage. See Murphy's Petition at 12-14.

An insured's failure to cooperate has been alternatively characterized as the failure of a condition precedent or a breach of a policy provision. Compare In re U.S.A. Elec., Inc., 120 Bankr. 637, 643 (Bankr. E.D. N.Y. 1990) (noting that the duty to cooperate goes to the very substance of the obligation of an insured, and is thus a condition precedent to the performance of the promise by the insurer to indemnify for an alleged loss); Pini v. Allstate Ins. Co., 499 F. Supp. 1003, 1004 (E.D. Pa. 1980), (holding that an insured's failure to adhere to policy conditions constituted an absolute bar to suit unless the insurer waived its right to rely on the provisions), aff'd, 659 F.2d 1070 (3d. Cir. 1981), with McCoy v. Travelers Indem. Co. of Am., 2002 U.S. Dist. LEXIS 27431, at *8 (M.D. Pa. Feb. 8, 2002) (noting that the lack of cooperation in the investigation of an alleged first-party loss constituted a material breach of a policy provision) and Ania v. Allstate Ins. Co., 161 F. Supp. 2d 424 (E.D. Pa. 2001)

(using a substantial prejudice standard for an insurer to be relieved of the obligation to provide coverage due to an insured's failure to cooperate).

However characterized, an insured's cooperation in the investigation of a claim is necessary so that an insurer can make an informed decision regarding the existence, nature, and extent of coverage under the policy. McCoy illustrates this point. In McCoy, the plaintiffs-insureds operated a small business that was destroyed by fire. After the plaintiffs submitted a first-party insurance claim to their carrier, the carrier investigated the claim. During the investigation, a number of questions arose concerning the cause and origin of the fire and the financial well-being of the plaintiffs at the time of the loss. While the plaintiffs initially cooperated with the insurer's investigation, they quickly stopped cooperating and began obstructing the insurer's investigation as suspicions grew concerning the cause of the fire. For example, the plaintiffs initially signed authorizations that allowed the insurer to obtain their financial records, but later withdrew their authorizations and blocked the insurer's access to their financial information. The husband-plaintiff also refused to testify as to the cause of the fire during his subsequent examination under oath, which prevented the insurer from analyzing the veracity of the insured. The insurer was also unable to fully develop relevant information regarding the findings from the fire investigator retained by the plaintiffs. Moreover, while the insurer requested all relevant documents and information at the outset of their investigation, the insurer never had an opportunity to review all of the relevant information until two years after the loss. Finally, the plaintiffs' expert fire investigator was ultimately not used. Under these facts, the court held that the insurer was relieved from the obligation to provide coverage under the policy regardless of the applicable standard. Id. at **17-18. The court noted that, although the plaintiffs had ample opportunity to produce relevant records and cooperate in the investigation of the claim, they simply chose not to cooperate to the detriment of their insurer. Id. at *17. The court was particularly troubled by the continued delays occasioned by the plaintiffs, as "[a]n insurer is entitled to receive information relevant to a loss promptly and while the information is still fresh." Id. at *16. In view of the numerous circumstances of

non-cooperation by the plaintiffs, the court found that there were no triable issues of fact regarding the plaintiffs' cooperation, and thus the insurer was entitled to summary judgment. Id. at **17-18.

The two principal cases relied upon by Murphy – Brakeman and Rohm and Haas – concern notice provisions and not breaches of the duty of cooperation. In both cases, the court held that an insurer could not forfeit coverage due to the lack of notice unless it was prejudiced. Brakeman v. Potomac Ins., 472 Pa. 66, 371 A.2d 193 (1997); Rohm & Haas Co. v. Continental Cas. Co., 566 Pa. 464, 781 A.2d 1172 (2001). Even if a notice provision could be analogized to the duty of cooperation, the courts below found, as discussed more fully below, that Federal was relieved of any obligation to provide coverage because it was prejudiced in the investigation of the claim due to Murphy's repeated failures to cooperate in the investigation.

Thus, whether characterized as a condition precedent or the breach of a policy provision, there can be little dispute that an insured has a duty to cooperate with an insurer's investigation of the loss.

B. THE POLICY REQUIRED EXAMINATIONS UNDER OATH FROM MURPHY, HIS WIFE, AND THEIR SONS

A principal component of the Murphys' duty of cooperation under the Federal Policy concerned the provision of examinations under oath. The Policy required that Murphy, Mrs. Murphy, and their sons all submit to examinations under oath (*i.e.*, a deposition) if requested by Federal:

> **Examination under oath.** We have the right to examine under oath as often as we may reasonably require ***you, family members and other members of your household and have them subscribe the same.*** We may also ask you to give us a signed description of the circumstances surrounding the loss and your interest in it, and to produce all records and documents we request and permit us to make copies.

The term "you" is also defined in the policy:

> **You** means the person named in the Coverage Summary, and a spouse who lives with that person.

Both Murphy and his wife Kathleen were named insureds in the Coverage Summary of the Policy. Kathleen Murphy was also a "you" as defined in the provision pertaining to Examination Under Oath and, as a result, she contractually agreed to provide such an examination. Examinations under oath are not an option for the insureds, as the Policy stated that Murphy and his wife "must" comply. ("If you have a loss this policy may cover, you must perform these duties . . . ."). ***Notably, Murphy and his wife recognized in the record below the mandatory nature of this obligation when they admitted that "sworn statements from plaintiff's wife [are] mandated under the policy provisions."*** (A. 29).

Moreover, the term "family member" contained in the Examination Under Oath provision is defined in the policy as "your relative who lives with you, or any other person under 25 in your care or your relative's care who lives with you." Murphy acknowledged that there were two sons living in the house during the effective dates of the policy. In fact, one of the alleged areas of damages at issue in this litigation was the sons' bedroom.

There is simply nothing ambiguous or unclear regarding the contractual obligations under the Policy to provide examinations under oath of Mrs. Murphy and the Murphy sons. The District Court agreed that this conclusion was inescapable, reasoning that "[t]he fact the Federal Policy requires deposition testimony of Murphy's family is compelled as a matter of logic and cannot be reasonably disputed . . . . . The words in the Federal Policy could not be clearer; the Federal Policy requires examinations under oath." (A. 28-29). The Third Circuit affirmed for substantially the same reasons. (A. 18).

In summary, despite Murphy's baseless protestations, the Federal Policy clearly required Murphy, his wife, and sons to fully

cooperate in the investigation of the alleged loss. As part of that duty, Mrs. Murphy and the Murphy sons were required to submit to examinations under oath, but they refused to do so.

C. MURPHY FAILED TO COOPERATE IN THE INVESTIGATION OF THE ALLEGED LOSS

Both the District Court and the Third Circuit found that Murphy's refusal to cooperate during the investigation of the alleged loss hindered and prejudiced Federal's investigation. (A. 18-19, 30). The courts were particularly troubled by Federal's inability to depose Mrs. Murphy and the Murphy sons. (A. 18-19, 30).

To place this issue in context, it is important to note that Federal moved to compel the deposition of Mrs. Murphy and the examinations under oath of the Murphy sons after Federal's attempts to secure these examinations were ignored. Even after the District Court granted Federal's motions to compel the depositions of Mrs. Murphy and the two sons, Murphy and his wife refused to cooperate in scheduling these depositions and did not appear for them. When Federal subsequently scheduled the depositions with adequate notice to the parties, neither Mrs. Murphy nor the Murphy sons appeared. Instead, Murphy and his wife ignored the District Court's February 25, 2005 Orders, and filed an appeal to the Third Circuit. Although Murphy applied for emergency stays to both the District Court and the Third Circuit, the applications were denied. As a result, Murphy had no justifiable excuse for this defiance. Both Murphy and his wife admitted that her examination under oath was "mandated" by the Federal Policy.

The refusals to provide the required examinations under oath were but one example of tactics that could be charitably described as "non-cooperative." Murphy's tactics amounted to more than that, as he continually delayed, stonewalled, and obstructed Federal's investigation. Although there were numerous examples of these tactics in the record below, some of the more prejudicial instances include the following:

- Murphy did not provide notice of the claim to Federal until March 2000 – some six months after the incident allegedly occurred. By then, significant portions of the alleged damages were reportedly "repaired" or "altered," and Plaintiff had not taken nor preserved through photographs or otherwise, evidence of these alleged damages.

- Invoices and documentation of the alleged damages were submitted to Federal during the course of the last five years in a piecemeal fashion, and, for the most part, only in response to repeated discovery requests and/or after motions were filed with the District Court. In fact, the record clearly demonstrates that Murphy's repeated promises to supply additional information and documentation in support of his claim went repeatedly unfulfilled.

- While Murphy allowed limited inspections of the property after the claim was finally reported to Federal, Murphy subsequently refused to allow Federal full and timely access to all of the areas allegedly damaged. (A. 204-06, 375). Federal, nearly five-and-a-half years after the alleged incident, had an opportunity to fully examine the property with experts, and only after Murphy was ordered to do so by the District Court.

- Murphy refused all requests for a complete deposition of a witness, Joseph Mingioni, whom Murphy had earlier identified as a person with knowledge of the loss. The deposition was completed only after intervention by the District Court.

- Murphy commenced litigation against Federal without complying with all of the conditions precedent in the Federal Policy. Federal was actually waiting for the submission of invoices and documentation of the loss when Murphy filed the Complaint.

Despite this, Murphy first contends that he fully cooperated with Federal's investigation. See Murphy's Petition at 4-5. He states that he provided immediate notification of the loss (a contention simply unsupported by the record), provided some documentation, and he personally appeared for an examination under oath. In essence, he argues that the information he provided was enough. Murphy again conveniently ignores that he failed to provide examinations under oath of his wife and sons – the principal basis for non-cooperation advanced by Federal and relied upon by the District Court and the Third Circuit. Although he now contests the obligation to provide examinations under oath, he has admitted in this case that ***"sworn statements from plaintiff's wife [are] mandated under the policy provisions."*** (emphasis added). He further admitted that his wife and sons refused to voluntarily appear for their depositions. Therefore, Murphy did not comply with his duties under the Policy.

Murphy further contends that, assuming that his wife and sons failed to cooperate by not providing examinations under oath, any consequences should not be visited upon him as an "innocent" co-insured. See Petition at 14. Murphy never raised this issue before the District Court, and it is therefore waived. Harris v. City of Philadelphia, 35 F.3d 840, 845 (3d Cir. 1994) (noting that an issue cannot be raised for the first time on appeal). If the issue is somehow not waived despite appearing for the first time on appeal, it is frankly laughable that Murphy considers himself an "innocent" co-insured. Murphy appeared in this case in a number of capacities. He was a named party, he was his own attorney, and he was the attorney for his wife. In his capacity as attorney for his wife, he took every conceivable step to prevent Federal from taking her deposition – first by playing games with scheduling, then by requiring a subpoena, then by objecting to the subpoena when served, then by

opposing Federal's motion to enforce that subpoena, then by refusing to appear her for deposition despite a court order, then by moving for emergency stays (which were denied) pending appeal, then by taking an appeal of the order compelling her deposition. Murphy is hardly an "innocent" co-insured. Rather, he is the orchestrator of the obstructionist strategy. Therefore, he is not akin to the innocent co-insureds that were at issue in Giacobetti v. Insurance Placement Facility, 500 Pa. 447, 457 A.2d 853 (1983) (arson by one insured barred recovery by him and his children, but did not bar recovery by other beneficiaries to trust).

Apparent from the foregoing recitation is the unmistakable conclusion that Murphy failed to cooperate with Federal's investigation of the claim and that Murphy was the instigator of the obstructionist strategy. The repeated stonewalling of Federal's investigation meant that Murphy's insurance claim relied on little else than his own testimony. Under Pennsylvania law, however, Federal was entitled to conduct its own investigation.

D. THE LACK OF COOPERATION PREJUDICED FEDERAL IN THE DEFENSE OF THE CLAIM

As a result of the Murphys' failure to cooperate with Federal's investigation of the alleged loss, the courts below properly concluded that Federal was entitled to summary judgment.

A full and fair investigation, including examinations under oath from Mrs. Murphy and the Murphy sons, was critical given the strange and suspicious nature of some of his contentions and the complete lack of objective proof to support his claim. For example:

- Murphy allegedly removed a huge tree from his backyard without anyone else (including his family members) observing it or knowing about it.

- Murphy allegedly put the wood from the fallen tree on his property, but inexplicably, he contends the wood quickly dissolved and was

unavailable to be inspected by Federal's representative.

- The Murphy sons allegedly do not know about damages or repairs to the bedroom they slept in.

- The alleged interior damage was repaired by a person for whom Murphy has no meaningful contact information.

- Mrs. Murphy, a co-named-insured on the Policy, allegedly did not know anything about damage to the swimming pool, garage roof (which was replaced), backyard fence, and three interior rooms of the home in which she resided.

- Murphy had no photographic evidence of the alleged tree (before or after it fell) or the alleged damage to the garage roof and his sons' bedroom. This utter lack of photographic or other evidence of claimed damage is particularly odd given the fact that Murphy is an experienced trial lawyer, and thus, well aware of the importance of such evidence.

Murphy and his wife's failure to cooperate with the investigation, including the refusal to provide the requested examinations under oath, resulted in prejudice to Federal, which was properly decided as a matter of law. See, e.g., McCoy, 2002 US DIST LEXIS 27431 (granting summary judgment to insurer on the basis that insured failed to cooperate and that such failure prejudiced the insurer and thus relieved it from liability under the policy); Champion v. Chandler, 1999 U.S. Dist. Lexis 15824, at **5-6 (E.D. Pa. Sep. 28, 1999) (same); Hyde Athletic Indus., Inc. v. Continental Cas Co., 969 F. Supp. 289, 300 (E.D. Pa. 1997) (same); Metal Bank v. Insurance Co., 360 Pa. Super. 350, 520 A.2d 493, 498 (same), appeal denied, 517 Pa. 607, 536 A.2d 1332 (1987).

Without information developed through a full investigation, Federal was substantially hindered and prejudiced in its ability to challenge Murphy's assertions as to the existence and extent of the alleged loss. Federal was also denied the benefit of exploring any potentially relevant information that might have been uncovered by a full investigation, including the examinations under oath.

Given the manner in which Murphy positioned this suspicious claim, it is perhaps unsurprising that he went to such great lengths to block Federal's investigation. But he was wrong in doing so. Once Murphy filed the insurance claim, he had a duty to cooperate with Federal's investigation under the terms of the Policy. Once Murphy filed suit, he had a duty to cooperate with discovery under the Federal Rules of Civil Procedure. Yet Murphy chose to ignore both duties, and instead, employed an obstructionist strategy and complained that Federal and the courts should simply take him at his word.

The District Court and the Third Circuit keenly saw through such tactics. (A. 17-19, 31). The District Court eloquently reasoned "Murphy cannot have it both ways; he cannot bring an action for breach and fail to cooperate with its progression." (A. 31). The Third Circuit echoed these comments:

> [T]here is no escape from the conclusion that notwithstanding his denial that he has done so, Murphy has been obstructing the proceeding by not complying with the discovery orders and the insurance policy, thereby prejudicing Federal.

(A. 19).

Given Murphy's failure to cooperate with the investigation and adhere to the District Court's orders, Federal was properly relieved of liability under the Policy through well-established law.

II. THE DENIAL OF A PROTECTIVE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S JURISDICTION

Murphy next contends that this Court should grant certiorari to review the denial of a protective order to block the deposition of Mrs. Murphy. See Petition at 7-10, 18-24. Murphy advances a procedural argument discussed in this section along with a substantive argument discussed in the next section. Both arguments may be quickly and easily dismissed.

A. MRS. MURPHY WAS CONTRACTUALLY REQUIRED TO SUBMIT TO AN EXAMINATION UNDER OATH

As discussed previously, both Murphy and his wife Kathleen were named insureds in the Coverage Summary of the Policy. Murphy and his wife admitted that they had a duty under the Policy to provide such sworn statements. Kathleen Murphy's contractual agreement to provide an examination under oath required that she voluntarily appear for a deposition without a subpoena.

B. MRS. MURPHY WAS PROPERLY SUBPOENAED

In view of Murphy and his wife's admission that they have a contractual obligation to provide a sworn statement, Kathleen Murphy should have appeared for a deposition without the necessity of a subpoena, but she was subpoenaed anyway. Murphy argues that Mrs. Murphy was not properly subpoenaed, and thus the District Court exceeded its jurisdiction by compelling her deposition. See Murphy's Petition at 7-10, 18-24. Murphy is again wrong.

1. The Subpoena Was Properly Served

According to the subpoena's proof of service, which was included in the record below, the subpoena was hand-delivered to Kathleen Murphy's residence on May 3, 2004. The subpoena was accepted by a male adult who refused to give his name.

Murphy disputes the validity of the subpoena by alleging that it was not properly served. However, Murphy simply restates this allegation, as he did to the courts below, without ever coming forward with a properly verified statement from him or his wife to challenge the process server's proof of service.

Moreover, Mrs. Murphy had actual notice of the deposition because her husband was the Plaintiff, Robert Murphy. Robert Murphy is an experienced attorney who knew of Federal's intent to subpoena her since May 2004 when he received a copy of the subpoena and return of service.

2. A Witness Fee Was Tendered

Murphy again takes the position that no witness fee was tendered with the subpoena. This contention is inherently inconsistent with Murphy's position that no subpoena was served at all. How can he know whether a witness fee was tendered with the subpoena if no subpoena was served at all? But again, this statement is not true and Murphy provides no properly verified statement to the contrary.

When the witness fee became Murphy's cause *du jour* with regard to his wife's deposition, Federal obtained a declaration from the process server which was included in the lower court record. The process server declares under penalty of perjury that "I specifically recall tendering a check with the subpoena when it was delivered . . . ."

3. The District Court's Jurisdiction Was Properly Invoked Over Mrs. Murphy

Murphy cites approximately 25 cases, many without explanation, for the proposition that a district court's jurisdiction cannot be invoked over a non-party until a subpoena is properly served. See Petition at 8-10. Here, however, the District Court's jurisdiction was properly invoked over Mrs. Murphy because the subpoena was properly served.

III. THE DENIAL OF A PROTECTIVE ORDER WAS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION

Murphy next contends that the District Court's Order denying a protective order for the deposition of Mrs. Murphy violated numerous rules of procedure, several amendments to the federal constitution, and state substantive law regarding marital privileges and spousal incompetency. Murphy is again wrong. As discussed at length in the previous two sections, Federal was fully within its rights to depose Mrs. Murphy.

What is more, as a resident of the insured premises, Mrs. Murphy may have had information relevant to the claim despite Murphy's unilateral protestations to the contrary. Moreover, no marital privilege prevented Mrs. Murphy from offering her personal knowledge concerning the alleged loss. Mrs. Murphy was also competent to testify in this manner because, as the courts below properly recognized, the spousal incompetency privilege cannot be used a shield to prevent discovery of the facts and circumstances of an insurance claim. Each of these issues shall be discussed, in turn.

A. MRS. MURPHY'S TESTIMONY WAS RELEVANT

In order to block his wife's deposition, Murphy advanced his subjective belief that his wife's deposition was not relevant because she allegedly was on vacation and not present at their residence when the tree fell, and as a result, she has no knowledge of the loss. In spite of Murphy's allegations and subjective beliefs about what his wife did or did not know, Kathleen Murphy's deposition was relevant for at least four reasons.

First, she was a co-named insured on the insurance policy at issue in this case. Thus, she was contractually required to submit to a deposition.

Second, she was an occupant of the premises with apparent knowledge of circumstances that are relevant to this claim, such as

the portions of the premises that allegedly were damaged, the extent of the alleged damages, the source of the damage, and other pertinent circumstances. At Murphy's pretrial discovery deposition, he admitted that his wife observed the conditions of the premises before she went on vacation and observed the alleged changed conditions of the premises allegedly related to the loss after she returned from vacation. She, therefore, has knowledge that could lead to the discovery of admissible evidence.

Third, Federal needed to explore the circumstances of her interest in the real and personal property involved in the loss so a determination could be made regarding whether she was an indispensable party. Murphy contended that his wife had no interest in the real property. Federal was entitled to test the veracity of this contention.

Fourth, and perhaps most importantly, the suspicious circumstances of this claim detailed above coupled with the complete lack of objective proof required that Federal thoroughly investigate the claim. This concern is heightened due to Murphy's assertion of a claim for bad faith against Federal.

The case of Holm v. Pollack, 2001 WL. 1257728 (E.D. Pa. Oct. 19, 2001) fully supports the District Court's decision to require the deposition to go forward and bears a striking resemblance to the facts of this case. In Holm, the defendant and his wife (a non-party in the case) sought a protective order to prevent the deposition of the defendant's wife on the alleged grounds that she could offer no relevant information regarding the issues in dispute because her involvement with the home renovation plans at issue was minimal and she allegedly was not involved with the plaintiff and his staff in any significant way. The court stated that such an argument was unpersuasive, even if the court was to ignore the defendant's admission that his wife was involved in the design of the kitchen and certain other rooms. Id. at *1. The court observed that the plaintiff was not required to take the defendant-husband's word about what his wife knew or did not know:

> In the present case, the Plaintiff's ability to rebut the allegations of the Defendant would be severely hampered if this Court took away his right to depose one of the two adults living in the house in question. The Plaintiff correctly states that the Defendant's conclusory and self-serving assessment of the knowledge of a potential witness does not impair the discoverability of that knowledge, however slight.

Id. at *3.

Like the wife in Holm, Murphy's wife in this matter did not claim any harm as a result of being compelled to testify. Rather, Murphy merely contended that his wife had no relevant information that would come out of her deposition to displace the alleged inconvenience of giving the deposition. But as observed by the court in Holm, a defending party's ability to rebut the allegations of the contending party about matters relating to the deponent's home would be severely hampered if the court takes away the defending party's right to depose one of the adults living in the house in question. A party's conclusory and self-serving assessment of the knowledge of a potential witness does not impair the discoverability of that knowledge, however slight. Id. at *3.

Murphy claims that his wife's deposition was not necessary because Federal's representatives had an opportunity to visit and photograph the premises and, thus, they allegedly have independent knowledge of the loss and damages. What Murphy fails to realize, however, is that he provided late notice of his claim (six months after it occurred) and that by the time Federal's representative first had an opportunity to visit the premises, significant portions of the alleged damage had already been repaired and in such a way that evidence of the cause of those losses was destroyed. No photographs were taken.

In summary, Murphy relied almost entirely on his own testimony to support his claim against Federal. Given those circumstances, one can understand why he wanted to pick and choose the evidence presented to Federal, including who would be

deposed. He, of course, wanted to avoid conflicting testimony with his account of the events. The Federal Rules of Civil Procedure, however, did not give him that power. Those who have knowledge or whose testimony might lead to the discovery of admissible evidence are proper subjects of the deposition process, including his wife, who was a resident of the subject premises and a co-named insured on the subject insurance policy.

B. THE MARITAL PRIVILEGE DID NOT PREVENT KATHLEEN MURPHY FROM OFFERING HER PERSONAL OBSERVATIONS AND KNOWLEDGE

Murphy next contends that his wife was incompetent to testify due to the marital privilege. See Petition at 15-21. Murphy fundamentally continues to misunderstand this limited privilege.

The District Court's procedural ruling requiring Kathleen Murphy to submit to deposition did not require the waiver of any marital privilege asserted by Murphy. Any marital privilege between Murphy and his wife would apply only to communications between them and not to his wife's independent personal observations and/or knowledge. As courts construing Pennsylvania law have repeatedly noted, such privileges might protect some testimony, but do not foreclose a spouse from being deposed regarding matters of which he or she has knowledge or information. Holm, 2001 WL 1257728, at *3; Puricelli, 2000 WL 760522, at *8; Caplan v. Fellheimer Eichen Braverman & Kaskey, 162 F.R.D. 490, 491-92 (E.D. Pa. 1995). Absent an intrusion into the protected realm of marital communications, a party is not prohibited from deposing the spouse of a party or any other potential witness. Holm, 2001 WL 1257728, at *3.

As also observed by the court in Holm, any marital privilege could have been sufficiently protected through traditional objections made at the deposition pursuant to the Federal Rules of Civil Procedure. Id.

Like Holm, the relevant factors here favored denying the protective order. Murphy and his wife did not show "a clearly defined and serious injury" that will result from Kathleen Murphy's deposition. As a result, her deposition was properly compelled by the District Court.

C. MRS. MURPHY WAS FULLY COMPETENT TO TESTIFY

Murphy next contends that his wife was incompetent to testify under Pennsylvania's spousal incompetency law, which, in limited circumstances, renders spouses incompetent from offering adverse testimony against each other. This new argument – asserted for the first time on appeal in the Third Circuit – is similarly without merit.

1. Mrs. Murphy Was Fully Competent to Testify In This Context

(a) Incompetency Is Limited Only to Adverse Testimony

As a threshold matter, it must be noted that testimonial exclusionary rules and privileges contravene the fundamental principle that "'the public . . . has a right to every man's evidence.'" Commonwealth v. Spetzer, 572 Pa. 17, 34, 813 A.2d 707, 717 (2002) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Id. (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

The oft-stated rationale for the spousal-incompetency rule is marital harmony. Id. at 34, 813 A.2d at 718. For this reason, Pennsylvania's spousal-incompetency rule, codified at Title 42, Section 5924 of the Pennsylvania Statutes, extends only to adverse testimony. This section provides, subject to certain exceptions, that "In a civil matter neither husband nor wife shall be competent to

testify against each other." 42 Pa. C.S.A. § 5924 (emphasis added). Testimony that is not "against" the other spouse is not incompetent. Id. It is only where the spouse testifies against the other spouse that the incompetency rule applies. Id. If a spouse testifies favorably or innocuously, there is no prohibition with respect to her testimony. Id. Thus, as summarized by Pennsylvania's supreme court, "a husband or wife is now deemed competent to testify against his or her spouse, but has a privilege to refuse to give adverse testimony, which he or she may waive." Spetzer, 572 Pa. at 34, 813 A.2d at 718.

Federal intended to take Mrs. Murphy's deposition – as it was contractually permitted to do under the Policy – because she was an occupant of the premises with apparent knowledge of circumstances that are relevant to this insurance claim, such as the portions of the premises that allegedly were damaged, the extent of the alleged damages, the source of the damage, and other pertinent circumstances. Federal also intended to explore the circumstances of her interest in the real and personal property involved in the loss so a determination can be made regarding whether she is an indispensable party. As a result, the purpose of Mrs. Murphy's deposition was not to elicit adverse testimony, but simply to explore her knowledge of the facts and circumstances that underlie this insurance claim.

(b) If Mrs. Murphy's Testimony Would Have Been Truly Adverse to Murphy in This Context, Then the Fraud Exception Was Triggered

To the extent that Mrs. Murphy's testimony would, in fact, have been different or adverse to Murphy's suspicious version of the events, then the fraud exception would have been triggered in this context. Brown v. Scafidi, 839 F. Supp. 342, 343 (E.D. Pa. 1993) (holding that a wife was deemed competent to testify to reveal her husband's fraudulent personal injury and legal malpractice suit). This exception is grounded on public policy, and applies to prevent spouses from aiding each other in the perpetration of a fraud. Kine v. Forman, 205 Pa. Super. 305, 310, 209 A.2d 1, 3 (1965). Thus,

Federal was entitled to depose Mrs. Murphy to expose a material misrepresentation; that is, a fraud.

(c) Incompetency Did Not Apply in This Action in Which Murphy Is Alleged to Recover for a Loss to Separate Property

Another exception to spousal incompetency is applicable where, as here, a spouse sues to recover separate property. Title 42, Section 5927, of the Pennsylvania States provides:

> In any action brought by either the husband or wife to protect and recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one or the other, unless this privilege is waived upon the trial.

42 Pa. C.S.A. § 5927.

The term "separate property" is not used in the statute in any technical sense, but rather, in a broad and comprehensive, sense. Morrish v. Morrish, 262 Pa. 192, 198, 105 A. 83, 85 (1918).

Here, Murphy contended – over and over again – in the courts below that the real property in question was his "separate property" and his complaint makes clear that this is an action to protect his property by having it repaired at Federal's expense. Therefore, the separate-property exception was applicable and Mrs. Murphy was fully competent to offer testimony in this case.

2. In Any Event, the Argument Was Waived Because It Was Asserted for the First Time on Appeal

Although Murphy opposed his wife's deposition on numerous bases, including confidentiality of marital communications under Title 42, Section 5923 of the Pennsylvania Statutes, Murphy never made a spousal-incompetency argument

under Section 5924 either in the District Court, or in his principal brief filed with the Third Circuit. This new argument is therefore waived. Harris, 35 F.3d at 845. As explained by this Court over 65 years ago, the issue is waived because the late assertion prevents the opportunity to develop a proper record before the district court:

> [T]he requirement to raise the issue below is] essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556 (1941); see also Singleton v. Wulff, 428 U.S. 106, 120 (1976) (noting that, when an argument was raised for the first time on appeal, "[w]e have no idea what evidence, if any petitioner would, or could, offer in defense [of the argument].").

Even assuming that this Court somehow finds that Murphy raised the spousal-incompetency argument under Section 5924 in the District Court – which he plainly did not – Murphy's failure to pursue the issue in his opening appellate brief in the Third Circuit nonetheless results in waiver. Ghana v. Holland, 226 F.3d 175, 180 (3d Cir. 2000) (finding issue raised for first time in reply brief waived, reasoning "Rule 28(a)(5) of the Federal Rules of Appellate Procedure and our Local Appellate Rule 28.1(a) requires appellants to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief."); Stern v. Halligan, 158 F.3d 729, 731 n.3 (3d Cir. 1998) ("A party cannot raise issues for the first time in a reply brief."); Kost v. Kozakiewicz, 1 F.3d 176, 182 (3d Cir. 1993) (same).

IV. THE COURTS BELOW DID NOT AWARD SUMMARY JUDGMENT AS A RESULT OF DISCOVERY SANCTIONS

Murphy next argues that the courts below erred by awarding summary judgment as a discovery sanction in violation of Murphy's

constitutional rights, including the right to due process of law. See Murphy's Petition at 10-12. Although the courts below would have been fully correct in awarding summary judgment as a discovery sanction for Murphy's obstructionist conduct, they did not do so. Rather, both courts found that Murphy's contractual breach of the duty to cooperate with Federal's investigation of the claim resulted in prejudice to Federal and thus no coverage under the Policy. (A. 18-19, 29-31). Certiorari cannot be invoked to review a ruling that was simply not made below.

CONCLUSION

This case represents a circuit court's ordinary and correct interpretation of federal law on routine discovery issues and state law on well-established insurance issues. No more, no less. Murphy has not presented any compelling reason for this Court to accept certiorari and, for these reasons, the petition should be denied.

Respectfully submitted,

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